SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 138

UNITED STATES OF AMERICA, PETITIONER,

vs.

AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

1 IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 24190

AMERICAN-FOREIGN STEAMSHIP CORPORATION,
Libelant-Appellant,

against

UNITED STATES OF AMERICA, *Respondent-Appellee.*

Adm. 183-356

Appendix to Appellant's Brief—Filed September 28, 1956

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2 IN UNITED STATES DISTRICT COURT

Amended Libel and Complaint—Filed September 23, 1955

TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

A. 183-356

The Amended Libel and Complaint

of

AMERICAN-FOREIGN STEAMSHIP CORPORATION,
80 Broad Street, New York, N. Y.

v.

THE UNITED STATES OF AMERICA in a Cause of Contract, Civil and Maritime, Alleges upon Information and Belief as Follows:

1. Jurisdiction of this Court in this suit is claimed under the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.* Libelant hereby elects to have this cause proceed in accordance with the principles of libels *in personam.*

2. Libelant is a corporation organized under the laws of the State of New York, having its principal place of business at 80 Broad Street in the City, County, State and Southern District of New York, and is a citizen of the United States within the meaning of Section 2 of the Shipping Act, 1916, 46 U.S.C. 802.

3. Respondent's actions hereinafter set forth were taken through the War Shipping Administration (hereinafter called WSA), United States Maritime Commission (hereinafter called the Commission), and the Maritime Administration of the United States Department of Commerce, all of said agencies being instrumentalities of the United States. The functions of WSA were transferred to the Commission by Public Law 492, 79th Cong., 60 Stat. 401. The functions of the Commission were transferred to the Maritime Administration by Reorganization Plan 21 of 1950, 15 F. R. 3178.

4. Pursuant to and in accordance with the terms of The Merchant Ship Sales Act of 1946, respondent was authorized to charter certain war-built vessels to citizens of the United States. Section 5(c) of that Act, 50 U.S.C. App. 1738(c), made the terms of Section 709 of the Merchant Marine Act, 1936, 46 U.S.C. 1199, applicable to charters made under The Merchant Ship Sales Act of 1946. Section 709 of the Merchant Marine Act, 1936, provides, in part:

> "(a) Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years."

5. Libelant applied to WSA and, later, to the Commission to bareboat-charter certain war-built merchant vessels of the United States under the Merchant Ship Sales Act. Bareboat charter agreements purportedly in accordance with that Act were prepared by respondent and tendered

to libelant for execution as a condition precedent to the allocation of vessels pursuant to the aforesaid applications. Accordingly, libelant and respondent executed such charter agreements as follows: Contract No. WSA-13061.
4 WARSHIPDEMISEOUT Form No. 203 on June 6, 1946, and addendum thereto; and Contract No. MCc-41726, SHIPSALESDEMISE Form No. 303 on September 2, 1946, and addenda thereto. The following merchant vessels owned by the United States were chartered to libelant under the aforementioned charter agreements:

Contract WSA-13061	Date of Delivery	Date of Redelivery
S.S. WILLIAM LIBBEY	6-24-46	9-20-46
S.S. JAMES ROY WELLS	6-24-46	9-22-46
S.S. NATHAN CLIFFORD	7- 3-46	9-28-46
S.S. ABIGAIL GIBBONS	7- 9-46	10- 4-46
S.S. WALKER D. HINES	7-16-46	10-10-46
S.S. SAMUEL D. INGHAM	7-20-46	9- 9-46
S.S. THOMAS NELSON	7-23-46	9- 6-46
S.S. JOHN LIND	8- 1-46	9-11-46
S.S. EDWARD L. LOGAN	8-22-46	11-10-46
S.S. ROBERT WATCHORN	8-24-46	10-17-46
S.S. JOHN P. POE	8-30-46	11- 8-46
Contract MCc-41726		
S.S. EDWARD L. LOGAN	11-11-46	5-19-47
S.S. ROBERT WATCHORN	10-18-46	5-26-47
S.S. NATHAN CLIFFORD	9-29-46	5-26-47
S.S. WILLIAM LIBBEY	9-21-46	7-14-47
S.S. PETER DESMET	5-17-47	1- 7-48
S.S. GEORGE HANDLEY	2-13-47	1-26-48
S.S. WILLIAM P. MCARTHUR	4-23-47	1-29-48
S.S. JOHN A. QUITMAN	11-16-46	2- 4-48
S.S. SAMUEL D. INGHAM	9-10-46	2-20-48
S.S. CASMIR PULASKI	11-16-46	3-10-48
S.S. O.B. MARTIN	5-17-47	3-17-48
S.S. MARGARET FULLER	2-17-47	5-31-48
S.S. ABIGAIL GIBBONS	10- 5-46	9-29-49
S.S. JAMES ROY WELLS	9-23-46	11-21-49
S.S. WILLIAM WHEELWRIGHT	11- 9-46	11-22-49
S.S. JOHN LIND	9-12-46	11-25-49
S.S. JOHN P. POE	11- 9-46	11-25-49
S.S. THOMAS R. MARSHALL	6-12-47	12- 7-49
S.S. OSCAR CHAPPELL	10-14-46	12-15-49
S.S. THOMAS NELSON	9- 6-46	12-27-49
S.S. WALKER D. HINES	10-11-46	12-28-49

6. Clause 12 of Part II of Contract No. MCc-41726 (46 C.F.R. 299.82) provided:

"CLAUSE 12. *Basic Charter Hire.* The Charterer shall pay to the Owner the basic charter hire at the monthly rate provided for in Part I hereof from the day and hour of delivery of the Vessels until and including the day and hour of redelivery to the Owner pursuant to the terms of this Agreement; or if any Vessel shall be lost, hire shall continue until the time of her loss, if known, or if the time of loss be uncertain then up to and including the time last heard from. Payment of such basic charter hire shall be made to the Owner at Washington, D. C., on delivery of the Vessel for the remainder of the calendar month in which delivery is made, and thereafter monthly in advance on the first day of each month."

Such basic charter hire was duly paid by libelant to respondent.

7. Notwithstanding the provisions of both The Merchant Ship Sales Act of 1946, particularly Section 5(c) thereof, and the Merchant Marine Act, 1936, particularly Section 709 thereof, and in violation thereof, respondent unlawfully inserted in Part II of the aforesaid charter agreement, Clause 13 (46 C.F.R. 299.82), reading as follows:

"CLAUSE 13. *Additional Charter Hire.* If at the end of the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall exceed 10 per centum per annum on the Charterer's capital necessarily employed in the business of the Vessels (all as hereinafter defined), the Charterer shall pay over to the Owner at Washington, D. C., within 30 days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to the percentages of such cumulative net voyage profit in excess of 10 per centum per annum on such capital computed in accordance with the following table (but such cumu-

lative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period):

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of $100 per day—50%.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $100 per day but not in excess of $300 per day—75% on such excess over $100 per day.

Cumulative net voyage profit (in excess of 10% per annuam on capital necessarily employed) in excess of $300 per day—90% on such excess over $300 per day.

"The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (WARSHIPDEMISEOUT) charter (prior to the times of payment provided for above or in such WARSHIPDEMISEOUT chartered) at such times and in such manner and amounts as may be required by the Owner, provided however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required."

8. Respondent prescribed in General Order 60, Supplement 21 (46 C.F.R. 299.37-2), Accounting Procedures and Regulations which respondent required libelant to follow, reading, in part, as follows:

"II. *Accounting Requirements.*

"A. *Contract Provisions and Applicable Orders and Instructions*

7 "1. Clause 13 of Part II of WARSHIPDEMISEOUT 203 and SHIPSALESDEMISE 303 prescribes

the fundamental bases for the calculation and payment to the Commission of additional charter hire. These clauses provide, among other things, for preliminary payments by the Charterer to the Owner on account of additional charter hire, subject to adjustment upon completion of final audit by the Owner, at which time such payments will be made by or to the Owner as such final audit may show to be due.

"2. General Order 60, Supplement 8, and amendments thereto, prescribe the times at which and the manner and amounts in which such preliminary payments are required by the Owner to be made by the Charterer. To implement these provisions of General Order 60, on or about November 25, 1946 instructions were issued for the guidance of Charterers in the preparation of the statements required to accompany preliminary payments on account of additional charter hire, upon the express understanding that neither their issuance by the Commission nor their observance by the Charterer would prejudice the rights of either under the applicable agreement or otherwise, and that the Commission reserved the right to prescribe other bases for the determination of additional charter hire at the time of the annual or final accounting under the respective agreements. Such instructions have been supplemented from time to time.

* * * *

"B. *Annual and Final Accounting*

"1. Pursuant to the applicable provisions of the bareboat charter agreements, the Commission hereby requires that each Charterer submit a separate final accounting of additional charter hire accrued to the owner during the entire period of operations under WARSHIPDEMISEOUT 203 and for each annual or overall accounting period under SHIPSALES-DEMISE 303 and addenda thereto. Each such accounting sh ll be submitted in sextuplicate and shall include the basic statements prescribed in Part V—Statements Required by the Commission—hereof.

8 "2. With the respect to each such accounting, if the amount of additional charter hire shown hereby

to have accrued to the Owner is *in excess of* the total of the payments theretofore made to the Commission (*less* any refunds theretofore made by the Commission on account of such payments) on account of additional charter hire for the period involved, such accounting shall be accompanied by the Charterer's check payable to the 'Treasurer of United States for account of United States Maritime Commission' in the amount of such excess.

"3. If, conversely, in any instance the amount of additional charter hire shown by such accounting to have accrued to the Owner is *less than* the total of the payments theretofore made to the Commission (*less* any refunds theretofore made by the Commission on account of such payments) on account of additional charter hire for the period involved, the Charterer may apply to the Commission for refund of such overpayment and, if such application is found to be in order, the amount of the overpayment will be refunded by the Commission . . ."

9. Pursuant to the aforesaid Clause 13 of Part 2 of the charter agreement (Contract MCc-41726) and the foresaid General Order 60, Supplement 21, respondent required libelant to make preliminary payments and libelant did make preliminary payments of additional charter hire to respondent for the period of operations from June 1, 1946 through December 31, 1949, totaling the sum of $1,503,753.60.

10. The formula prescribed by the Merchant Ship Sales Act of 1946, particularly Section 5(c) thereof, and the Merchant Marine Act, 1936, particularly Section 709 thereof, fixes the amount of additional charter hire that accrued to respondent for the period of operations from June 1, 1946 through December 31, 1949, at $1,193,386.28.

11. On October 11, 1954, pursuant to Supplement 21 of General Order 60, libelant submitted to respondent
9 a final accounting for the period of operations from June 1, 1946 through December 31, 1949, which showed that there was then due and owing by the respondent to the libelant the sum of $310,772.41, being the difference

between the preliminary payments of charter hire made by libelant to respondent ($1,504,158.69) and the amount of additional charter hire fixed by the aforesaid Acts of Congress ($1,193,386.28). A copy of said final accounting is annexed hereto, made a part hereof, and marked Exhibit A.

12. At the time libelant filed said final accounting, libelant duly demanded from respondent the aforesaid sum of $310,772.41. (The said final accounting and the said demand were subsequently amended by reducing the amount claimed to $310,367.32.)

13. On November 3, 1954, and at various times thereafter, respondent refused and continues to refuse to accept the said final accounting submitted by the libelant or to audit the same or to pay to libelant the aforesaid sum of $310,367.32, or any part thereof.

14. Libelant has duly performed all conditions on its part to be performed.

WHEREFORE, libelant prays that respondent be required to appear and answer the matters aforesaid and that this Court decree to libelant damages in the amount of $310,367.32, together with interest and costs.

ARTHUR M. BECKER
Foley & Statt
Proctors for Libelant
Office and Post Office Address:
80 Broad Street
New York, N. Y.

Exhibit A to Amended Libel and Complaint

AMERICAN FOREIGN STEAMSHIP CORPORATION
RECAPITULATION OF ADDITIONAL CHARTER HIRE PAID AND PAYABLE FOR REVISED ACCOUNTINGS AND SUPPLEMENTARY ACCOUNTINGS SUBMITTED TO JULY 31, 1954

			Cumulative Net Profit in Excess of 10% Per Annum of "Capital Necessarily Employed"	Provisions for Federal Income Taxes	TOTAL	Additional Charter Hire in Accordance With Sec. 5:C of Merchant Ship Sales Act of 1946		Additional Charter Hire Paid U.S.M.A.	Difference Due American Foreign Steamship Corp.
						Percent	Amount		
1946									
203	As per Revised Accounting dated 12-4-52		$ 656,258.00		$ 656,258.00	50%	328,129.00	328,129.00	
203	Supplementary Accounting to 7-31-54‡		327.75		327.75	50%	163.88		
203	Supplementary Exhibit "A"			**—$12,087.54	— 12,087.54	50%	— 6,043.77		
							322,249.11	328,129.00	5,879.89
303	As per Revised Accounting dated 12-4-52		14,602.57		14,602.57	50%	7,301.29	7,301.29	
303	Supplementary Accounting to 7-31-54‡		816.39		816.39	50%	408.20		
303	Supplementary Exhibit "A"			— 15,661.23	— 15,661.23	50%	— 7,830.62		
							— 121.13	7,301.29	7,422.42
1947									
303	As per Revised Accounting dated 12-4-52		1,603,835.56		1,603,835.56	50%	801,917.78	1,059,951.67	
303	Supplementary Accounting to 7-31-54‡		56,393.47		56,393.47	50%	28,196.74		
303	Supplementary Exhibit "A"			— 31,882.37	— 31,882.37	50%	—15,941.19		
		(Carried Forward)					814,173.33	1,059,951.67	245,778.34
303 FTA	As per Revised Accounting dated 12-4-52	(to 1948)	— 36,483.66		—	—	—	—	
303 FTA	Supplementary Accounting to 7-31-54‡	"	— 229.89		—	—	—	—	
303 FTA	Supplementary Exhibit "A"	"		— 14,076.17	—	—	—	—	
							—	—	
1948		(Carried Forward)							
303 FTA	As per Revised Accounting dated 12-4-52	(to 1949)	— 34,362.83		—	—	—	—	
303 FTA	Brought Forward from 1947	"	— 36,483.66		—	—	—	—	
303 FTA	Supplementary Accounting to 7-31-54‡	"	3,064.16		—	—	—	—	
303 FTA	Brought Forward from 1947	"	— 229.89		—	—	—	—	
303 FTA	Supplementary Exhibit "A"	"		— 50,916.29	—	—	—	—	
303 FTA	Brought Forward from 1947	"		— 14,076.17	—	—	—	—	
							—	—	—
1949									
303 FTA	As per Revised Accounting dated 12-4-52		288,399.95						
	Less Loss Carried forward from 1947-1948		— 70,846.49						
			217,553.46		217,553.46	50%	108,776.73	108,776.73	
303 FTA	Supplementary Accounting to 7-31-54‡		671.72						
	Loss Carried forward from 1947	—229.89							
	Profit Carried forward from 1948	3,064.16	2,834.27						
			3,505.99		3,505.99	50%	1,753.00		
303 FTA	Supplementary Exhibit "A"			— 41,897.06					
	Carried forward from 1947-1948			— 64,992.46					
				—106,889.52	—106,889.52	50%	—53,444.76		
							57,084.97	108,776.73	51,691.76
	TOTAL				2,386,772.53		1,193,386.28	1,504,158.69	310,772.41

* Adjustment necessary to allow 10% net return on "Capital Necessarily Employed" after payment of Federal Income Taxes.

** The figures preceded by a minus sign appear in red on the original accounting.

‡ See Supplementary Schedule "C" attached hereto.

13 **Supplementary Exhibit "A"**

AMERICAN FOREIGN STEAMSHIP CORPORATION

1946

	Warshipdemise 203 Contract No. WSA 1306]	Shipsaledemise 303 Contract No. MCc 41726
Allowable Return of 10% per Annum on Capital Necessarily Employed as per Revised accounting dated 12-4-52	$ 19,721.78	$ 25,552.54
Cumulative Net Voyage Profit as per Revised Accounting dated 12-4-52	675,979.78	40,155.11
Cumulative Net Voyage Profit in excess of 10% per annum of "Capital Necessarily Employed" as per revised accounting dated 12-4-52 on which all Additional Charter Hire has been paid	$ 656,258.00	$ 14,602.57
Supplementary Accounting of Amounts Recorded from 4-1-51 to 7-31-54 Net Voyage Profit	$ 327.75	$ 816.39
Less Adjustment necessary to allow 10% net return on "Capital Necessarily Employed" after payment of Federal income taxes	12,087.54	15,661.23
Net Loss	*—11,759.79	—14,844.84
To Refund of Overpayment of Additional Charter Hire @ 50%	5,879.89	7,422.42

* The figures preceded by a minus sign appear in red on the original accounting.

Supplementary Exhibit "A"

AMERICAN FOREIGN STEAMSHIP CORPORATION

1947

	Warshipdemise 303 Contract No. MCe 41726	Warshipdemise 303 F.T.A. Contract No. MCe 41726
Allowable Return of 10% per Annum on "Capital Necessarily Employed" as per Revised accounting dated 12-4-52	$ 52,018.61	$ 22,966.38
Cumulative Net Voyage Profit as per Revised accounting dated 12-4-52	1,655,854.17	*—13,517.28
Cumulative Net Voyage Profit in excess of 10% per Annum of "Capital Necessarily Employed" as per revised accounting dated 12-4-52 on which all Additional Charter Hire has been paid	$1,603,835.56	$—36,483.66
Supplementary Accountings for Amounts Recorded from 4-1-51 to 9-31-54	56,393.47	— 229.89
Less Adjustment necessary to allow 10% Net Return on "Capital Necessarily Employed" after payment of Federal Income Taxes	31,882.37	14,076.17
Net Profit	$ 24,511.10	
Net Loss (Carried forward to 1948)		$—14,306.06
Additional Charter Hire @ 50%	$ 12,255.55	

* The figures preceded by a minus sign appear in red on the original accounting.

Supplementary Exhibit "A"

AMERICAN FOREIGN STEAMSHIP CORPORATION

1948

	Warshipdemise 303 F.T.A. Contract No. MCe 41726
Allowable Return of 10% per Annum on "Capital Necessarily Employed" as per revised accounting dated 12-4-52	$ 83,073.96
Cumulative Net Voyage Profit as per revised accounting dated 12-4-52	$ 48,711.13
Cumulative Net Voyage Loss Plus Allowable Return for 1947 as per revised accounting dated 12-4-52	*$ —36,483.66
	$ 12,227.47
Cumulative Net Voyage Profit in excess of 10% per Annum of "Capital Necessarily Employed" as per revised accounting dated 12-4-52 on which all Additional Charter Hire has been paid	$—70,846.49
Supplementary Accounting for Amounts Recorded from 4-1-51 to 7-31-54	3,064.16
Cumulative Net Voyage Loss (1947 Supp.) Plus adjustment of Allowable Return after taxes	$ —14,306.06 —11,241.90
Less Adjustment necessary to allow 10% Net Return on "Capital Necessarily Employed" after payment of Federal Income Taxes	$—50,916.29
Carried forward to 1949	$—62,158.19

* The figures preceded by a minus sign appear in red on the original accounting.

16 **Supplementary Exhibit "A"**

AMERICAN FOREIGN STEAMSHIP CORPORATION

1949

		Warshipdemise 303 F.T.A. Contract No. MCe 41726
Allowable Return of 10% per Annum on "Capital Necessarily Employed" as per Revised accounting dated 12-4-52.		$ 68,358.37
Cumulative Net Voyage Profit as per Revised accounting dated 12-4-52	$ 356,758.32	
Net Allowable Return in excess of cumulative Profit for period 1947 and 1948	*$ —70,846.49	285,911.83
Cumulative Net Voyage Profit in excess of 10% per Annum of "Captial Necessarily Employed" as per revised accounting dated 12-4-52 on which all Additional Charter Hire has been paid		$ 217,553.46
Supplementary Accounting for Amounts Recorded from 4-1-51 to 7-31-54	671.72	
Cumulative Net Voyage Loss and Adjustments carried forward from 1947 and 1948	$ —62,158.19	$ —61,486.47
Less Adjustment necessary to allow 10% Net Return on "Capital Necessarily Employed" after payment of Federal Income Taxes		$ —41,897.06
Net Loss		$—103,383.53
To refund Overpayment of Additional Charter Hire @ 50%		$ 51,691.76

* The figures preceded by a minus sign appear in red on the original accounting.

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Supplementary Schedule "C"

AMERICAN FOREIGN STEAMSHIP CORPORATION

INCOME SHEET

FOR PERIODS ENDED DECEMBER 31, 1946, DECEMBER 31, 1947, DECEMBER 31, 1948, DECEMBER 31, 1949

	1946		1947		1948	1949
	203	303	303	303 FTA	303 FTA	303 FTA
	Contract No. WSA 13061	Contract No. MCe 41726	Contract No. MCe 41726	Contract No. MCe 41726	Contract No. MCe 41726	Contract No. MCe 41726
Cumulative Net Profit in excess of 10% per Annum of "Capital Necessarily Employed" as per Revised Accounting Dated 12-4-52	656,258.00	14,062.57	1,603,835.56	—36,483.66	—34,362.83	217,553.46
TERMINATED VOYAGE RESULTS						
Amounts Recorded 4-1-51 to 7-31-54						
Revenue	—	—	41,141.30	—	—	—
Expense	*—327.75 327.75	—816.39 816.39	—15,252.17 56,393.47	229.89 —229.89	—3,064.16 3,064.16	—1,321.25 1,321.25
	656,585.75	14,878.96	1,660,229.03	—36,713.55	31,298.67	218,874.71
Inactive Vessel Expense						649.18
	656,585.75	14,878.96	1,660,229.03	—36,713.55	—31,298.67	218,225.18
Less Adjusted Net Profit on which Additional Charter Hire has been Paid as per Adjusted Accounting dated 12-4-52	656,258.00	14,062.57	1,603,835.56	—36,483.66	—34,362.83	217,553.46
	327.75	816.39	56,393.47	—229.89	3,064.16	671.72

* The figures preceded by a minus sign appear in red on the original accounting.

19 IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A. 183-356

AMERICAN FOREIGN STEAMSHIP CORPORATION, Libelant,

- against -

UNITED STATES OF AMERICA, Respondent.

**Government's Exception to Amended Libel—
Filed September 27, 1955**

The respondent, appearing specially, hereby excepts to the amended libel herein on the following ground:

(1) This Court lacks jurisdiction over the subject matter of this suit and over the respondent for the reason that this suit was not commenced within two years after the cause of action alleged in the libel arose, as required under Section 5 of the Suits in Admiralty Act, 46 U.S.C. 745.

Dated: New York, N. Y.
September 27, 1955.

Yours, etc.,

PAUL W. WILLIAMS
United States Attorney
Proctor for Respondent
Appearing Specially
Office & P. O. Address
607 U. S. Court House
Foley Square
New York 7, N. Y.

To: ARTHUR M. BECKER, ESQ.
MESSRS. FOLEY & STATT
Proctors for Libelant
80 Broad Street
New York 4, N. Y.

Affidavit of John E. Griffith

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOHN E. GRIFFITH, being duly sworn, deposes and says:

I am vice-president of the libelant herein. Upon information and belief, the last vessel held under bareboat charter from the United States Maritime Commission was returned to the Maritime Commission December 28, 1949. Thereafter, on February 21, 1950, the United States Maritime Commission issued General Order 60, Supplement 21, which was published in the Federal Register. In accordance with the provisions thereof, on September 21, 1951, libelant made a preliminary payment of $327,730.16. The said preliminary payment was accompanied by a letter reading as follows:

"September 21, 1951

Mr. J. F. Keating,
District Comptroller
United States Department of Commerce
Maritime Administration
45 Broadway
New York 6, New York

Attention: Mr. T. Conroy

Re: Bareboat Charterers 203 and 303 Agreements—
Accounting—Pursuant to Supplement 21
General Order 60

Dear Sir:

We enclose check to the order of the Treasurer of the United States, a/c United States Department of Commerce, Maritime Administration, in the amount of $327,730.16, together with subject accountings in sextuplicate covering Additional Charter Hire due the Maritime Administration.

This remittance is subject to adjustment upon the completion of final accounting between the American Foreign Steamship Corporation and the Maritime Ad-

21 ministration and neither the tender of such payment by the American Foreign Steamship Corporation, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of either party under the terms of the agreements involved or otherwise.

Very truly yours,

American Foreign Steamship Corporation
JOHN E. GRIFFITH
Vice-President"

Thereafter, and on or about September 21, 1953, libelant made a further preliminary payment of $3,141.08, subject to the terms and conditions of General Order 60, Supplement 21.

The present suit is for the return of $310,367.32 from these preliminary payments.

/s/ JOHN E. GRIFFITH

(Verified, April 2, 1956)

IN UNITED STATES DISTRICT COURT

Affidavit of Melvin Spaeth

DISTRICT OF COLUMBIA) ss:

MELVIN SPAETH, being duly sworn, deposes and says:

I am a member of the bar of the District of Columbia and I am associated with the proctor for the libelant herein.

I have examined excerpts from the minutes of the United States Maritime Commission. Those excerpts show:

1. That in the early part of August 1946, the United States Maritime Commission, having indicated its intention to cancel all existing bareboat charters of war-built vessels and to require all future charters (from August 31 on) to contain a progressive recapture clause providing for the payment of so-called "additional charter hire" on

a sliding scale reaching as high as 90 percent of
22 the cumulative net profit in excess of 10 percent per annum on capital necessarily employed rather than at the statutory rate of one-half the cumulative net profit in excess of 10 percent per annum on capital necessarily employed, various steamship associations, including the Ship Operators Association to which the libelant belonged and which acted on its behalf, protested the contemplated action;

2. That on September 4, 1946, the Maritime Commission rejected the protest of the ship operators, including those representing libelant, to the recapture provisions of the contemplated charter parties but adopted the recommendation of its General Counsel that the clause of the proposed charter party containing the disputed item, i.e., Clause 13, be modified by adding thereto the following:

> "The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (WARSHIPDEMISEOUT) charter (prior to the times of payment provided for above or in such WARSHIPDEMISEOUT charters) at such times and in such manner and amounts as may be required by the Owner; provided however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required."

The proposed charter as so modified was by direction of the Maritime Commission published in the Federal Register (see 46 C.F.R. § 299.82) and duly executed by libelant and others.

/s/ MELVIN SPAETH

(Verified, April 2, 1956)

23 IN UNITED STATES DISTRICT COURT

Affidavit of Arthur M. Becker

DISTRICT OF COLUMBIA) ss:

ARTHUR M. BECKER, being duly sworn, deposes and says:

I am proctor for the libelant herein and fully familiar with all the proceedings heretofore had herein. I make this affidavit in opposition to respondent's motion to sustain its exceptions to the amended libel.

At the trial or hearing on the merits of this suit, I intend to prove that preliminary payments of additional charter hire were not treated by the Maritime Commission as payments received for the account of the Government, but on the contrary, were treated by the Maritime Commission, with the approval of the Comptroller General of the United States, as trust funds, received as security so that funds would be available for the payment of additional charter hire when and if such additional charter hire accrued to the Government.

Section 12 (d) of the Merchant Ship Sales Act of 1946, 50 U.S.C. App. § 1745(d), provides in pertinent part that:

> "All monies received by the [Maritime] Commission under this Act shall be deposited in the Treasury to the credit of miscellaneous receipts."

The Comptroller General ruled, however, that this statutory provision was inapplicable to preliminary payments of additional charter hire because "those receipts did not represent 'earned' moneys when first received." 33 Dec. Comp. Gen. 503, at 504 (1954). Instead, the Comptroller General authorized these payments to be held in a special "trust account," entitled "13X6869 Unearned Moneys Merchant Ship Sales, War-built Vessel Department of Commerce."

Upon information and belief, preliminary payments of additional charter hire were maintained in this trust account until such time as there was a final audit of the
24 charterer's accounts, at which time the Maritime Commission assessed what was due to the Government and what was due to the charterer. The source of

my information and the grounds for my belief with respect to the foregoing is an investigation conducted by my staff, as well as the published opinion of the Comptroller General, 33 Dec. Comp. Gen. 503, at 504 (1954). This investigation disclosed, among other things, that upon the audit of the final accounting, as prescribed in General Order 60, Supplement 21, the Maritime Commission refunded out of the trust account what it regarded as excessive preliminary payments of additional charter hire. Attached hereto, as an example of such a refund, is a photostatic copy of the payee's copy of a public voucher of the Polarus Steamship Co., Inc., 30 Broad Street, New York, New York. Attention is called to the legend under Articles or Services reading as follows:

> "Claim for refund of excess of preliminary payments made to the U. S. Maritime Administration on account of additional charter hire, over the amount of such additional charter hire indicated to be due the Administration for the period from January 1, 1951 to July 31, 1951 under Bareboat Charter Agreement Shipsalesdemise 303, E.C.A., Contract No. MCc-62763 as per accounting rendered pursuant to General Order No. 60, Supplement No. 21, which, by this reference, is incorporated in this claim for refund.
>
> | | |
> |---|---|
> | Total amount preliminary payments | $51,105.78 |
> | Total amount due per final accounting | 27,762.87 |
> | Balance due Polarus Steamship Co., Inc. | |
> | Total | $23,342.91" |

Attention is also called to the legend "Appropriation title", reading as follows:

> "13X6869 Unearned Money's Merchants Ship Sales, War-Built Vessel Department of Commerce"

This Account No. 13X6869 Unearned Moneys, Merchant Ship Sales, War-Built Vessels is the trust account described by the Comptroller General in the opinion set forth above. My office has in its possession fifteen other similar vouchers indicating refunds of preliminary payments of additional charter hire to eight different steamship companies, all out of the same trust account. It is therefore plain that the Maritime Commission did not

treat the preliminary payments of additional charter hire as "monies received" by the Government until such time as its final audit of the accounts, at which time the charterer became entitled, under the terms of the charter agreement and the various regulations, to the return of any excessive preliminary payment.

/s/ ARTHUR M. BECKER

(Verified, April 28, 1956)

Exhibit to Affidavit of Arthur M. Becker

PUBLIC VOUCHER FOR PURCHASES AND SERVICES OTHER THAN PERSONAL

Voucher prepared at New York, N. Y. March 15, 1953

To Polarus Steamship Co., Inc.
Address 30 Broad Street, New York, N. Y.

Claim for refund of excess of preliminary payments made to the U. S. Maritime Administration on account of additional charter hire, over the amount of such additional charter hire indicated to be due the Administration for the period from January 1, 1951 to July 31, 1951 under Bareboat Charter Agreement Shipsalesdemise 303, E.C.A., Contract No. MCe-62763 as per accounting rendered pursuant to General Order No. 60, Supplement No. 21, which, by this reference, is incorporated in this claim for refund.

Total amount preliminary payments	$51,105.78
Total amount due per final accounting	27,762.87
Balance due Polarus Steamship Co., Inc.	
Total	$23,342.91

Polarus Steamship Co., Inc.
Original Signed by S. J. Lapisardi, Comptroller

Account verified; correct for 23,342.91

(Signature or initials) CEM

MEMORANDUM

13X6869 Unearned Money's Merchants
Ship Sales War-Built Vessel
Department of Commerce

26a IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 24200

STOCKARD STEAMSHIP CORPORATION, *Libelant-Appellant*,

against

UNITED STATES OF AMERICA, *Respondent-Appellee*.

Appendices to Appellant's Brief—Filed October 2, 1956

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27 IN UNITED STATES DISTRICT COURT

Libel—Filed October 5, 1954

TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

AD. 183-200

The Libel and Complaint of STOCKARD STEAMSHIP CORPORATION, 17 Battery Place, New York 4, New York,

against

THE UNITED STATES OF AMERICA, in causes of contract, civil and maritime, respectfully alleges upon information and belief, as follows:

FIRST: That libelant, Stockard Steamship Corporation, is a corporation organized and existing under the laws of the State of New York, having its principal place of business in New York, New York.

SECOND: That respondent is the United States of America, a sovereign state, which has consented to be sued under the provisions of the Suits in Admiralty Act (41 Stat. 525, 46 U. S. C. § 741, *et seq.*). The Maritime Administration, U. S. Department of Commerce (successor to the U. S. Maritime Commission), is an instrumentality and agency of respondent.

THIRD: That, pursuant to the provisions of the Merchant Ship Sales Act of 1946 (60 Stat. 41), respondent was authorized to charter certain war-built vessels on a bare-boat basis to citizens of the United States. Section 5 of that Act provided in part as follows:

"Sec. 5. (a) Any citizen of the United States and, until July 4, 1946, any citizen of the Commonwealth of the Philippines, may make application to the Commission to charter a war-built dry-cargo vessel under the jurisdiction and control of the Com-
28 mission, for bare-boat use. The Commission may, in its discretion, either reject or approve the application, but shall not so approve unless in its opinion the chartering of such vessel to the applicant would be consistent with the policies of this Act. No vessel shall be chartered under this section until sixty days after publication of the applicable prewar domestic cost in the Federal Register under subsection 3(c) of this Act.

"(b) The charter hire for any vessel chartered under the provisions of this section shall be fixed by the Commission at such rate as the Commission determines to be consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum of the statutory sales price (computed as of the date of charter). Except in the case of vessels having passenger accommodations for not less than eighty passengers, rates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in the subsection shall not be less than the prevailing world market charter rate for similar vessels for similar use as determined by the Commission.

"(c) The provisions of Sections 708, 709, 710, 712, and 713, of the Merchant Marine Act, 1936, as amended, shall beapplicable to charters made under this section."

FOURTH: That Section 709 of the Merchant Marine Act, 1936 (49 Stat. 1985) as amended, the terms of which were

incorporated by reference in Section 5(c) of the Merchant Ship Sales Act, 1946, quoted above, provides in part as follows:

"Sec. 709. (a) Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

"(b) Every charter shall contain a definition of the terms 'net voyage profit' and 'fair and reasonable overhead expenses', and 'capital necessarily employed', as said terms are used in subsection (a) of this section, setting forth the formula for determining such profit and overhead expenses and capital necessarily employed, which definitions shall have been previously approved by the Commission and published in the advertisement for bids for such charter."

FIFTH: That bareboat charter contracts MCc-41728, MCc-62623 and MCc-62752 were prepared by respondent purportedly in accordance with the aforesaid provisions of law and tendered to libelant for execution as a condition precedent to the allocation of the vessels under bareboat charter. Accordingly, said contracts were executed by libelant and respondent on September 2, 1946, August 21, 1950, and January 5, 1951, respectively.

SIXTH: That notwithstanding the mandatory provisions of law aforesaid, the said contracts, which were the same in substance as the standard form prepared by respondent and a complete copy of which will be

made available at the trial of this matter, provided in Clause 13 in part as follows:

"CLAUSE 13. *Additional Charter Hire.* If at the end of the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall exceed 10 per centum per annum on the Charterer's capital necessarily employed in the business of the Vessels (all as hereinafter defined), the Charterer shall pay over to the Owner at Washington, D. C., within 30 days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to the percentages of such cumulative net voyage profit in excess of 10 per centum per annum on such capital computed in accordance with the following table (but such cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period):

"Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of $100 per day—50%.

"Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $100 per day but not in excess of $300 per day—75% on such excess over $100 per day.

"Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $300 per day—90% on such excess of $300 per day."

"The Charterer agrees to make preliminary payments to the Owner on account of such additional
31 charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (WARSHIPDEMISEOUT) charter (prior to the times of payment provided for above or in such

(WARSHIPDEMISEOUT charters) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required."

SEVENTH: That pursuant to the aforesaid Clause 13 in each of the charters, and the accounting regulations promulgated and prescribed by respondent, the respondent required the libelant from time to time to submit preliminary accounting statements based upon the computation of additional charter hire in excess of the maximum amount of one-half of the cumulative net voyage profit after 10% of the charterer's capital necessarily employed, permitted under Section 709 of the Merchant Marine Act, 1936.

EIGHTH: That respondent refused to permit libelant in the computation of additional charter hire to apply net voyage profits earned in certain years against net voyage losses sustained in the next subsequent year (as indicated by the Schedule "A" annexed hereto and incorporated herein), despite the fact that both the law and the contract provisions aforesaid provided for additional charter hire to be computed on a cumulative basis.

NINTH: That from time to time, libelant, without agreeing to said accounting regulations and methods, was
32 required to make certain payments on account, based upon the accountings prepared by respondent.

TENTH: That as a result, respondent has wrongfully required libelant to pay additional charter hire in excess of the amount permitted under the aforesaid Section 709, in the amount of approximately $458,037.99.

ELEVENTH: That although duly demanded by libelant, respondent has refused and continues to refuse to make any further adjustments in the accountings and to make reimbursement of the aforesaid amount of additional charter hire which was exacted contrary to law.

TWELFTH: That by reason of the premises, libelant has been damaged in the aggregate amount of $458,037.99, which sum has been demanded and is presently due and owing by respondent to libelant.

THIRTEENTH: That the accountings of libelant referred to above were submitted to and reviewed by respondent, with the understanding that they were without prejudice to such further adjustments as might be warranted under the terms of the charter and pursuant to law. Libelant alleges, on information and belief, that there are or may be developed in further consideration of said accountings, items of controversy between libelant and respondent, and libelant accordingly reserves the right to amend this libel to include such items of controversy, and to increase the amount of damages demanded, as may be necessary and appropriate.

FOURTEENTH: That libelant has duly performed all and singular the obligations resting on it under the contract.

33 FIFTEENTH: That all and singular, the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libelant prays that upon service of a copy of this libel on the United States Attorney for this district, and the mailing of a copy thereof to the Attorney General of the United States, in accordance with law, respondent, The United States of America, be required to appear and answer all and singular the matters aforesaid, according to the principles of law and rules of practice obtaining in like cases between private parties, and that this Honorable Court be pleased to decree to your libelant damages in the amount of $458,037.99, together with such interest as is allowable thereon for delay in payment thereof, as well

as costs, and that your libelant may have such other and further relief as in law and justice it may be entitled to receive.

ZOCK & PETRIE
Proctors for Libelant
Office & P. O. Address
52 Broadway
New York 4, New York

RADNER, ZITO, KOMINERS & FORT
Of Counsel
Office & P. O. Address
Tower Building
1401 K Street, N. W.
Washington 5, D. C.

34 **Schedule "A" to Libel**

Stockard Steamship Corporation

Extract from Report Rendered District Comptroller, U. S. Department of Commerce, Maritime Administration, New York May 11, 1954 Submitted in accordance with General Order No. 60 Supplement 21 (Exhibit C-1948)

Contract-Shipsalesdemise 303 MC 41728

Income Sheet for the Period January 1, 1948 to December 31, 1948 before Additional Charter Hire and Federal Income Taxes

TERMINATED VOYAGE RESULT		
Revenue	$125,568.00	
Expenses	(181,187.27)	
Gross Profit (Loss) from Vessel Operations		($ 55,619.27)
OVERHEAD		
Administrative and General Expense Net	$ 6,458.02	
Advertising Expenses	48.09	
Taxes other than Federal Income Tax including N. Y. State Credit	284.60	(6,221.51)
Gross Profit or (Loss) from Shipping Operations before Depreciation		($ 61,840.78)
DEPRECIATION—SHIPPING PROPERTY		
Other Shipping Property and Equipment		(134.28)
Gross Profit or (Loss) from Shipping Operations		($ 61,975.06)
OTHER INCOME		
Interest Earned		214.67
Loss		($ 61,760.39)
OTHER DEDUCTIONS FROM INCOME		
Interest Expense	$ 277.20	
Post Redelivery Overhead	886.25	(1,163.45)
Net Loss on Contract		($ 62,923.84)

NOTE: Overhead etc. allocated per formula

Application of Carry Back of Loss 1948

Excess Profits Contract MCe41728 period 1/1-12/31/47 per Report 5/11/54	$1,882,757.03
Loss Period 1/1-12/31/48 as above	(62,923.84)
Adjusted Excess Profits subject to additional charter hire	$1,819,833.19

[( ) = loss or expense]

32

35 *Duly sworn to by J. O. Wroldsen*
jurat omitted in printing

36 IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A. 183-200

STOCKARD STEAMSHIP CORPORATION, *Libelant,*

against

UNITED STATES OF AMERICA, *Respondent.*

Respondent's Exceptive Allegations to Libel of Stockard Steamship Corporation—Filed March 27, 1956

TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

The respondent, for its exceptive allegations, alleges:

1. On September 2, 1946, respondent acting by and through the United States Maritime Commission, a government agency created pursuant to the provisions of the Merchant Marine Act, 1936, as amended, and libelant executed bareboat charter bearing No. MCc-41728 pursuant to which the respondent agreed to charter certain vessels to libelant upon the terms and conditions set forth in said charter.

2. Pursuant to the terms and provisions of said charter and certain addenda thereto, respondent delivered certain vessels to the libelant and annexed hereto, marked Schedule A and made a part hereof, is a schedule setting forth the names of the vessels delivered to libelant, the date of the delivery of each vessel and the date of the redelivery of each vessel by said libelant.

3. All of the vessels chartered by libelant from the respondent pursuant to the charter and addenda to said charter were redelivered by said libelant to the respondent by December 13, 1949.

37 4. Upon the redelivery by the libelant to the respondent of all of the vessels chartered to libelant,

the charter entered into between the parties was thereby terminated and any alleged cause of action thereunder existed and arose on December 13, 1949, the date of the redelivery of the last of the vessels chartered to libelant.

5. On August 21, 1950, respondent acting by and through the United States Maritime Commission, a government agency created pursuant to the provisions of the Merchant Marine Act, 1936, as amended, and libelant executed bareboat charter bearing No. MCc-62623 pursuant to which the respondent agreed to charter certain vessels to said libelant upon the terms and conditions set forth in said charter.

6. Pursuant to the terms and provisions of said charter and certain addenda thereto, respondent delivered certain vessels to the libelant and annexed hereto, marked Schedule B and made a part hereof, is a schedule setting forth the names of the vessels delivered to libelant, the date of the delivery of each vessel and the date of the redelivery of each vessel by libelant.

7. All of the vessels chartered by libelant from the respondent pursuant to the charter and addenda to said charter were redelivered by libelant to the respondent by February 11, 1952.

8. Upon the redelivery by the libelant to the respondent of all of the vessels chartered to libelant, the charter entered into between the parties was thereby terminated and any alleged cause of action thereunder existed and arose on February 11, 1952, the date of the redelivery of the last of the vessels chartered to libelant.

9. On January 5, 1951, respondent acting by and through the United States Maritime Commission, a government agency created pursuant to the provisions of the Merchant Marine Act, 1936, as amended, and libelant executed bareboat charter bearing No. MCc-62752
38 pursuant to which the respondent agreed to charter certain vessels to libelant upon the terms and conditions set forth in said charter.

10. Pursuant to the terms and provisions of said charter and certain addenda thereto, respondent delivered

certain vessels to the libelant and annexed hereto, marked Schedule C and made a part hereof, is a schedule setting forth the names of the vessels delivered to libelant, the date of the delivery of each vessel and the date of the redelivery of each vessel by libelant.

11. All of the vessels chartered by libelant from the respondent pursuant to the charter and addenda of said charter were redelivered by libelant to the respondent by March 19, 1951.

12. Upon the redelivery by the libelant to the respondent of all of the vessels chartered to libelant, the charter entered into between the parties was thereby terminated and any alleged cause of action thereunder existed and arose on March 19, 1951, the date of the redelivery of the last of the vessels chartered to libelant.

13. By reason of the premises this Honorable Court lacks jurisdiction over the subject matter and over the respondent because suit was not instituted by libelant against the respondent within two years after libelant's alleged causes of action arose, as required under Section 5 of the Suits in Admiralty Act of March 9, 1920, as amended, 46 U. S. C. 745.

WHEREFORE, respondent prays that the libel herein be dismissed with costs.

PAUL W. WILLIAMS
United States Attorney
Proctor for Respondent
Office & P. O. Address
607 U. S. Court House
Foley Square
New York 7, N. Y.

39 **Schedule A to Respondent's Exceptive Allegations Etc.**

Vessel	Date of Delivery	Date of Redelivery
Arunah S. Abell	September 9, 1946	October 21, 1947
Charles N. Cole	October 3, 1946	January 22, 1948
Fred E. Joyce	September 21, 1946	October 30, 1947
George Durant	September 14, 1946	October 23, 1947
George N. Segar	September 3, 1946	September 24, 1948
John Ireland	September 21, 1946	February 6, 1948
John L. Elliott	October 1, 1946	December 12, 1946
Samuel Blatchford	December 12, 1946	September 23, 1948
W. S. Jennings	September 17, 1946	December 13, 1949
Wendell L. Wilkie	November 16, 1946	July 22, 1949
Charles Piez	December 27, 1946	October 28, 1947
Clifford E. Ashby	November 20, 1946	August 23, 1949
Florence Martus	September 26, 1946	November 18, 1947
Frederick Remington	November 15, 1946	July 23, 1949
Herman Melville	November 13, 1946	November 1, 1949
James B. Richardson	January 12, 1947	March 12, 1948
Joseph C. Lincoln	September 26, 1946	November 28, 1949
Louisa M. Alcott	December 28, 1946	September 16, 1947
Patrick S. Mahorey	January 31, 1947	November 22, 1947
William Wilkins	December 27, 1946	July 12, 1949
	Schedule B	
Red Oak Victory	August 29, 1950	February 11, 1952
Duke Victory	August 23, 1950	October 29, 1951
Norwich Victory	March 17, 1951	November 7, 1951
	Schedule C	
Niagara Victory	January 12, 1951	March 19, 1951

Exhibit 1

RELEVANT CHARTER PROVISIONS

CLAUSE 2. *Surveys.* (a) The Vessels shall be jointly surveyed before delivery (unless fully surveyed under an immediately preceding WSA Form 203 charter WARSHIPDEMISEOUT entered into between the parties) and before redelivery under this Agreement to determine and state the condition of the Vessels. Such surveys shall include dry-docking to determine and state the condition of the underwater parts, unless, at owner's option, the dry-docking in connection with delivery is postponed, in which event the cost and time of any damage to underwater parts found either upon redelivery or during the period of the Vessel's use under this Agreement shall be for Owner's account unless such damage is established, from the basis of all evidence, to have occurred during the period of the Vessel's use under this Agreement or under any immediately preceding WARSHIPDEMISEOUT Form 203 charter entered into between the parties. The cost and time of such delivery survey shall be for the account of the Owner, and similarly the cost and time of such redelivery survey shall be for the account of the Charterer.

(b) Subject to the foregoing provisions as to underwater parts in the event dry-docking is postponed, and except as to items noted on the delivery survey report as defective, the delivery of the Vessel by the Owner and the acceptance thereof by the Charterer shall constitute full performance by the Owner of all the Owner's obligations under Clause 1, and thereafter the Charterer shall not be entitled to make or assert any claim against the Owner on account of any agreements, representations or warranties, expressed or implied, with respect to the condition of the Vessel; provided, however, that the Owner shall nevertheless be responsible for the cost and time of repairs or
41 renewals occasioned by latent defects in the Vessel, its machinery or appurtenances or defects due to locked in stresses in the Vessel existing at the time of delivery, not recoverable under the terms and conditions of the

American Hull form of policy (American Institute of Marine Underwriters 7/1/41) containing no deductible average clause. For the purposes of this clause and of the Charter the delivery survey held for the immediately preceding WARSHIPDEMISEOUT form shall be deemed to be the delivery survey under this Charter.

• • • • • •

CLAUSE 4. *Inventory.* A complete inventory of the Vessel's entire outfit, equipment, furniture, furnishings appliances, spare and replacement parts and of all unbroached consumable stores, slop chest and fuel on board shall be jointly taken at the time of delivery, and mutually agreed upon as to items, by representatives of the Charterer and the Owner, and a similar inventory shall be taken and mutually agreed upon at the time of redelivery. The parties may agree, however, to accept any suitable prior inventory which may have been taken before the delivery of the Vessel under this Agreement, either on the occasion of the redelivery of the Vessel from a general agency agreement with the Owner, or otherwise.

CLAUSE 5. *Consumable stores and fuel.* The Charterer shall accept and pay for all unbroached consumable stores and fuel on board at the time of delivery (unless the vessel was under WARSHIPDEMISEOUT 203 form of charter entered into between the parties) and the Owner shall accept and pay for all unbroached consumable stores (with the exception of perishable stores, broached or unbroached, and slop chests, in the event the Vessel is redelivered at a port regularly serviced by the Charterer or at the port of redelivery provided for in Clause G of Part I hereof) and fuel on board (but not in excess of vessel's normal requirements in accordance with good operating practice), at the time of redelivery at the market prices current at the ports and times of delivery and of redelivery, respectively. "Consumable stores" within the meaning of this agreement shall mean all consumable and subsistence stores, and returnable containers (but not expendable equipment, scrap and junk) listed in the United States Maritime Commission Voyage Stores Reports, Forms 7915A, 7916A, 7918A and 7919A (Revised Forms 1939), and slop chests.

42

CLAUSE 6. *Use of equipment.* The Charterer shall have the use of all outfit, equipment, furniture, furnishings, appliances, spare and replacement parts on board the Vessel at the time of delivery under this Agreement or any immediately preceding WARSHIPDEMISEOUT 203 form of charter between the parties, without extra cost and the same shall be returned to the Owner on redelivery in the same good order and condition as when received, ordinary wear and tear excepted. Any such items damaged or so worn in service as to be unfit for use (unless through ordinary wear and tear) or lost or destroyed shall be replaced or made good by the Charterer in kind at or before redelivery, or at Owner's option, the Charterer shall pay for said items at the current market prices at the port and time of redelivery. Any overages accepted by the Owner shall be paid for at the current market prices at the port and time of redelivery.

* * * * * *

CLAUSE 12. *Basic Charter Hire.* The Charterer shall pay to the Owner the basic charter hire at the monthly rate provided for in Part I hereof from the day and hour of delivery of the Vessels until and including the day and hour of delivery to the Owner pursuant to the terms of this Agreement; or if any Vessel shall be lost, hire shall continue until the time of her loss, if known, or if the time of loss be uncertain then up to and including the time last heard from. Payment of such basic charter hire shall be made to the Owner at Washington, D.C., on delivery
43 of the Vessel for the remainder of the calendar month in which delivery is made, and thereafter monthly in advance on the first day of each month.

CLAUSE 13. *Additional Charter Hire.* If at the end of the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall exceed 10 per centum per annum on the Charterer's capital necessarily employed in the business of the Vessels (all as hereinafter defined), the Charterer shall pay over to the Owner at Washington,

D. C., within 30 days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to the percentage of such cumulative net voyage profit in excess of 10 per centum per annum on such capital computed in accordance with the following table (but such cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period):

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of $100 per day—50%.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $100 per day but not in excess of $300 per day—75% on such excess over $100 per day.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $300 per day—90% on such excess over $300 per day.

The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (WARSHIPDEMISEOUT) charter (prior to the times of payment provided for above or in such WARSHIPDEMISEOUT charters) at such times and in such manner and amounts as may be required by the Owner; provided however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required.

44

* * * * * *

CLAUSE 15. *Redelivery of Vessel.* The Vessels shall be redelivered to the Owner (unless lost) pursuant to the terms of this Agreement, in the same or as good order, condition and class as that in which they were delivered,

unless the lack of good order, condition and class is due solely to ordinary wear and tear. At the redelivery survey provided for in Clause 2, surveyors representing both the Charterer and the Owner, or a surveyor satisfactory to both sides, shall be present, who shall determine and state the repairs or work necessary to place the Vessel on the date of redelivery in the condition and class required in this paragraph which findings shall include all repairs or work (as distinguished from postponed annual or periodical surveys) required by outstanding classification or marine inspection requirements of the Coast Guard, Treasury Department, in effect as of date of delivery to place her in such condition. The Charterer, before redelivery, shall make all such repairs and do all such work so found to be necessary at its expense and time, or at Owner's option, the Charterer shall on Owner's request discharge such obligation by payment to the Owner of an amount sufficient to place the Vessel in such condition and class and to provide for the foregoing work and repairs at the prices current at the time of redelivery, which amount shall also include compensation at the rate of basic hire payable under this Agreement for the time reasonably required under then existing conditions to complete such work or repairs and compensation for other expenses (including insurance) incident to such work or repairs or which would have been borne by the Charterer if the repairs had been effected prior to redelivery. The Charterer shall not be required to make any repairs or to satisfy any classification or marine inspection requirements of the Coast Guard, Treasury Department, which were for Owner's account under Clause 2 of this Agreement but if such repairs were made or such requirements were satisfied after delivery under this Agreement and paid for by the Owner, they shall be considered as having been made at the time of delivery for the purpose of determining the Charterer's obligations under this Clause 15. In the case of any vessel which was under an immediately preceding Warshipdemiseout 203 form of charter entered into by the War Shipping Administration and the Charterer the date of delivery referred to in this clause shall be deemed to be the date of delivery under such prior charter.

CLAUSE 23. *Definitions.* The terms "net voyage profit", "fair and reasonable overhead expenses", and "capital necessarily employed" as used herein with respect to the operations of the Vessel and services incident thereto are hereby defined, for the purpose of this Agreement only, as follows:

(a) *"Net Voyage Profit"* shall be determined by deducting from gross income, as hereinafter defined, such direct vessel operating expenses, terminal and other auxiliary operating expenses, overhead expenses, interest expense, amortization of deferred charges, depreciation on property utilized in the operation of the vessels, and all other charges which are customarily
46 made in accordance with sound accounting practice in determining net profits before provision for federal income taxes, all as the Owner may deem fair and reasonable, provided, that in instances where the Charterer engages in other activities in addition to the operation of the Vessels covered by this Agreement, such charges, other than those directly and exclusively allocable to the operation of the Vessels shall be prorated between these activities on such basis as the Owner may determine to be fair and reasonable.

"Gross Income" shall include such items as revenue earned from the carriage of cargo, passengers, and mail, terminal and other auxiliary operations and miscellaneous profits and losses, such as those arising from pooling agreements, advance and prepaid beyond items, bar and slop chest, and such other transactions as the Owner may determine are properly included. "Gross Income" shall include also interest earned, dividends received, and other non-operating income, as well as all accruals to the Charterer as an operating-differential subsidy. If the Charterer engages in any other activities in addition to the operation of the Vessels, the revenues and miscellaneous income, other than those exclusively applicable to the operation of the Vessels, shall be prorated between these activities, on such basis as the Owner may determine to be fair and reasonable.

Income consisting of capital gains and expenses consisting of capital losses shall in no event be included in the computation of "Net Voyage Profit", as above defined.

Income from and expenses attributable to assets, other than the Vessels, excluded in the computation of "Capital Necessarily Employed", as hereinafter defined, shall not be included in the computation of "Net Voyage Profit", as above defined.

47 (b) *"Fair and Reasonable Overhead Expenses"* shall include those expenses actually and necessarily incurred in the conduct of the business of operating the Vessels, such as salaries of officers; wages of employees; legal and accounting fees and expenses; rent, heat, light, and power; communication expenses; office supplies, stationery, and printing; membership dues and subscriptions, entertaining and solicitation; traveling expenses; insurance and bond premiums; postage; maintenance of office equipment; and miscellaneous administrative and general expenses, all as the Owner may determine to be fair and reasonable and properly included, provided, that there shall be deducted from the total of such expenses (1) the amount by which wages, salary, and allowances of compensation in any form for personal services received by any director, officer or employee (which term shall be construed in the broadest sense to include, but not to be limited to, managing trustees or other administrative agents) from the charterer and its affiliates, subsidiaries, and associates, directly or indirectly, shall in any instance exceed the amount of $25,000 per annum, prorated to the period of the agreement, and (2) agency fees, commissions, brokerage, and such other miscellaneous earnings as the Owner may determine to be properly deductible.

"Fair and Reasonable Overhead Expenses" shall include also freight, passenger, and other expenses incident to advertising the Vessels and the lines served by them; taxes, other than federal income taxes; and management and operating commissions, but only if and in the cases where the express written consent of the Owner has been given the Charterer to employ any

other person or concern as the managing or operating agent of the Charterer; all as the Owner may determine to be fair and reasonable and properly included.

48 If the Charterer engages in other activities in addition to the Operation of the Vessels, the "Fair and Reasonable Overhead Expenses" other than those directly and exclusively allocable to the Operation of the Vessels shall be prorated between such activities on such basis as the Owner may determine to be fair and reasonable.

(c) *"Capital Necessarily Employed"* shall be determined upon the basis of the net worth reported by the Charterer in its balance sheet as of the close of the month preceding the date of delivery of the first Vessel under this Agreement, adjusted as hereinafter provided. For the purpose of this determination, net worth, as stated in the balance sheet of the Charterer, shall be deemed to include capital stock, surplus and such subdivisions thereof as capital surplus, earned surplus, and accounts of like nature. Net worth, as thus stated, shall be adjusted in such manner as the Owner may determine to be fair and reasonable, including the elimination of appreciation adequate statement of the liabilities and such other adjustments as are consistent with sound accounting principles. In the computation of "Capital Necessarily Employed" good will, intangibles not actually purchased and paid for, and stock held in treasury shall be excluded.

Property and other assets utilized in the operation of the Vessels shall be valued at cost, including betterments and reconditioning costs, to the present owner or to any former owner at any time affiliated or associated directly or indirectly with the present owner, whichever is the lower, less depreciation; provided, that, the cost of acquisition of assets acquired in exchange for capital shares or other securities of the Charterer from other than holding, subsidiary, affiliated, or associated companies, shall not be in excess of the fair value of such property at the date of acquisition.

49 Additional capital, in the form of cash or tangible property paid in during the charter period, shall be

included in the computation of "Capital Necessarily Employed" from the date paid in. Conversely, any withdrawals of capital shall be deducted from the date withdrawn; provided, however, that no capital shall be withdrawn and no share capital shall be converted into debt without the prior written approval of the Owner. Earnings and capital gains (or losses) for any accounting period subsequent to the last day of the month preceding the month during which delivery of the first Vessel is made hereunder to the Charterer by the Owner, shall not be included in the computation of the "Capital Necessarily Employed" for the year or other accounting period in which realized (or sustained). Dividends paid out of earnings that have not been included in "Capital Employed" shall not be deducted from "Capital Employed".

If the Charterer engages in other activities in addition to the operation of the Vessels, the Owner shall determine the proper allocation of capital as between such activities. The amount so allocated to the operation of the Vessels shall be deemed to be the "Capital Necessarily Employed".

. . . . . .

CLAUSE 28. *Accounting, Report and Supervision.* (a) The Charterer and, to the extent required by the Owner, every affiliate, domestic agent, subsidiary, or holding company connected with, or directly or indirectly controlling or controlled by the Charterer

(1) shall keep its books, records and accounts relating to the management, operation, conduct of the business of and maintenance of the vessels covered by this Agreement in accordance with the "Uniform System of Accounts for Operating-Differential Subsidy Contractors" prescribed by the United States Maritime Commission in its General Order No. 22 and under such regulations as may be prescribed by the Owner: *provided*, however, that, if the Charterer is subject to the jurisdiction of the Interstate Commerce Commission, the Owner shall not require the duplication of books, records, and

accounts required to be kept in some other form by that Commission; and

(2) shall file, upon notice from the Owner, balance sheets, profit and loss statements, and such other statements of financial operations, special reports, memoranda of any facts and transactions, which in the opinion of the Owner affect the financial results in, the performance of, or transactions or operations under, this Agreement.

(b) The Owner is hereby authorized to examine and audit the books, records, and accounts of all persons referred to above in this Clause whenever it may deem it necessary or desirable, including an analysis of the surplus and all supporting accounts. The Charterer agrees to allow any and all auditors, inspectors, attorneys, and other employees, designated by the Owner, full, free and complete access at all reasonable times, to the Vessels when in port or undergoing repairs and to all books, records, papers, memoranda or other documents of the Charterer wherever located or of any holding company, subsidiary company or affiliated company of the Charterer pertaining to any activities relating in any way to the Vessel, and further agrees to permit the making of photostatic or other copies of any such books, records, papers, memoranda or other documents and to furnish without charge adequate office space and other facilities reasonably required by such auditors, attorneys, or inspectors in the performance of their duties. The Charterer further agrees to establish and maintain from time to time such checks upon or
51 systems of control of expenditures or revenues in connection with the operation of the Vessels as the Owner may request.

CLAUSE 29. *Termination of Business.* Upon termination of this Agreement, the Charterer shall turn over to the Owner, at such time and at such place as the Owner may direct, the Vessel and all property of whatsoever nature, which the Owner may theretofore have delivered to the Charterer or to which the Owner is entitled under the terms

of this Agreement, and the Charterer shall at its own expense make to the Owner such accounting as the Owner may require of all matters arising out of the operation of the Vessels and this Agreement, and shall adjust, settle, and liquidate such accounts, provided, however, that the Owner may collect directly all freight moneys or other debts remaining unpaid and apply any moneys collected on any unpaid balance due from the Charterer to the Owner. All expenses of such collection shall be for the account of the Charterer.

Exhibit 3

IN UNITED STATES DISTRICT COURT

OPEN ACCOUNT STATEMENT SHOWING ITEMS PAID, DEBITED, OR CREDITED, IN ACCOUNTS BETWEEN THE MARITIME ADMINISTRATION AND STOCKARD, TOGETHER WITH LETTERS AND SCHEDULES.

		To Maritime from Stockard			To Stockard from Maritime				
Note References	Date	Additional Charter Hire	Inventory Shortages	Repairing Defects Noted on Redelivery	Additional Charter Hire	Inventory Overages	Redelivery Diversion Expense	Other	Net Payment
	Various dates between December 31, 1946, and October 28, 1947, inclusive	$1,239,411.68	—	—	—	—	—	—	$1,239,411.68
	January 2, 1948	187,100.62	—	—	—	—	—	—	187,100.62
	January 29, 1948	160,778.69	—	—	—	—	—	—	160,778.69
	April 20, 1948	25,759.82	—	—	$ 5,699.60	—	—	—	20,060.22
	April 20, 1948	50,566.39	—	—	—	—	—	—	50,566.39
	July 6, 1948	4,344.33	—	—	—	—	—	—	4,344.33
	August 31, 1948	44,042.93	—	—	6,940.95	—	—	—	37,101.98
	January 31, 1949	16,860.99	—	—	—	—	—	—	16,860.99
	May 31, 1949	32,363.94	—	—	—	—	—	—	32,363.94
	June 30, 1949	8,422.70	—	—	—	—	—	—	8,422.70
	July 31, 1949	70,646.35	—	—	—	—	—	—	70,646.35
1	August 31, 1949	305,433.71	—	—	8,374.48	—	—	—	297,059.23
	September 30, 1949	13,487.90	—	—	—	—	—	—	13,487.90
2	February 28, 1951	245,969.20	$177,808.80	$6,073.75	855.94	$123,151.28	$52,563.94	$130,994.60	122,285.99
	May 28, 1951	19,596.66	—	—	—	—	—	—	19,596.66
	July 31, 1951	27,807.44	—	—	—	—	—	—	27,807.44
	August 16, 1951	1,462.05	—	—	—	—	—	—	1,462.05
	February 13, 1952	—	—	—	16,330.51	—	—	—	—
	February 27, 1952	312.22	—	—	—	—	—	—	312.22
3	March 17, 1953	127,557.20	—	—	—	22,121.85	36,975.99	—	68,459.36
4	June 23, 1953	—	9,390.76	—	1,372.75	—	—	—	8,018.01
	December 17, 1953	—	8,742.91	—	—	23,178.90	—	—	14,435.99
	December 21, 1953	—	19,535.07	—	—	26,573.43	—	—	7,038.36

NOTES: For detail, see Stockard's letters and supporting schedules to Maritime, dated as follows:

1. August 31, 1949, page 22b.
2. February 28, 1951, page 25b.
3. March 17, 1953, page 29b.
4. June 23, 1953, page 31b.

53 August 31, 1949

Chief, Bureau of Finance
United States Maritime Commission
Department of Commerce
Washington 25, D. C.

Dear Sir:

Re: Preliminary Determination and payment of Additional Charter Hire under Agreement Shipsales-demise—Foreign Trade Addendum

We are enclosing herewith the following schedules prepared in accordance with Supplement No. 8—General Order No. 60 covering all contracts for the years 1946-1949 inclusive. These schedules are being submitted pursuant to preliminary and tentative instructions issued by the Commission in General Order No. 60, Supplement No. 8 with express understanding that their observance by Charterers shall not prejudice Charterers rights under applicable laws and Charter Agreement, or otherwise. All contracts to December 31, 1948 have been revised to reflect the results as at June 30, 1949:

	Amount due You	Amount due Us
Contract 203—1946		$ 8,374.48
303—1946		6,352.44
FTA 1947	$ 7,904.90	
Contract 303—1947		3,210.02
FTA 1948	213,591.05	
FTA 1949		4,460.43
Contract 303—1948 (no balance due)	$221,495.95	$ 22,397.37
Total Balance Due on Contracts		199,098.58
	$221,495.95	$221,495.95

54 In our letter of February 28, 1949 we submitted to you revised statements covering all contracts as at December 31, 1948 showing a balance due us of $86,806.98, upon which settlement had been deferred in view of the fact

that our statements included accountings for the SS. *James B. Richardson* which were under discussion with your Legal Department. These accounts contained a carry-back of loss on this vessel under Contract 303 from 1948 to 1947 which you had previously advised us was contrary to the United States Maritime Commission's prescribed accounting procedure.

The statements which we now submit have been corrected to reflect the result of the SS. *James B. Richardson* in accordance with letter dated August 10, 1949 which we received from Mr. Elmer Metz, Assistant General Counsel for United States Maritime Commission, Washington, D. C. The statements reflect previous payments covering operations to December 31, 1948 as follows:

Our check #25786, August 31, 1948	$37,101.98
" " 27987 January 31, 1949	16,860.99

You will note from the above tabulation that we have rendered statement for Contract 303 for the year 1948 showing no charter hire due. This particular statement is necessary in view of the termination of the SS. *James B. Richardson* in March, 1948. However, if you will refer to our letter to you of August 31, 1948 with remittance of $37,101.98, you will note that we have made a deduction therefrom of $97,960.65 representing Contract 303 for 1947 with adjustments to March 31, 1948.

In view of the fact that the revised accounting which we submit herewith in accordance with Mr. Metz's letter indicates no charter hire due, we are including this amount in our present remittance. We are therefore enclosing herewith our check #30828 to your order for
55 $297,059.23 which represents the balance due you on all contracts to date.

Very truly yours,

STOCKARD STEAMSHIP CORPORATION

E. M. SLOMAN,
Comptroller.

EMS:HH
Enc.

56 February 28, 1951

District Auditor
U. S. Department of Commerce
Maritime Administration
45 Broadway
New York, N. Y.
Attn: *Mr. T. N. Conroy*

Dear Sir:

Re: Statements to be Submitted in Accordance With General Order 60 Supplement 21

We are enclosing herewith six copies of the above accounts covering bareboat operations under charter contracts WSA-12933 and MCe-41728 for the period May 1, 1946 to December 31, 1946,* prepared and certified by Arthur Andersen & Co. Also supplementing this account, is enclosed five penciled copies of vessel day formula (Exhibit D), which we are advised by Arthur Andersen & Co. are also required by you.

We have also prepared and enclose herewith four copies of Account Current as at December 31, 1950 indicating charter hire due you in accordance with Arthur Andersen & Co.'s report, taking into consideration payments on account, redelivery diversion expenses, inventories of consumable stores on delivery and redelivery, unpaid public vouchers covering General Agents compensation liquidation fees, etc., and balance to be considered covering items pending or in dispute with the Maritime Administration, such as latent defects, vessel deficiencies and allowance for difference in delivery and redelivery equipment inventories.

You will also find schedules in support of the Account Current detailing the various items included therein, also public Voucher #612 covering diversion expenses
57 included in the calculation of additional charter hire.

The Account Current Statement indicates a balance due you of $122,285.99 and our check #34608 to the order of the U. S. Department of Commerce, Maritime Administration is enclosed herewith in settlement.

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* A typographical mistake; should be 1949.

These schedules are being submitted in accordance with General Order 60 Supplement 23 with express understanding that their observance by Charterers shall not prejudice Charterers rights under applicable laws and Charter Agreement, or otherwise.

Yours very truly,

STOCKARD STEAMSHIP CORPORATION

E. M. SLOMAN,
Comptroller.

EMS:HA
Enc.

58

STOCKARD STEAMSHIP CORPORATION

Account Current as at December 31, 1950 with U. S. Department of Commerce—Maritime Administration

	Dr.	Cr.
Additional charter hire due per attached Statements prepared in accordance with General Order 60 Supplement 21:		
Contract 203—1946.....	418,006.41	
" 303—1946.....	160,338.66	
" 303—1947.....	1,230,813.74	
" FTA—1947.....	34,120.55	
" FTA—1948.....	287,264.35	
" FTA—1949.....	253,630.51	
	2,384,174.22	
Less total payments to date	2,138,205.02	245,969.20
Public Voucher No. 612—Redelivery Diversion Expenses included in calculation—additional charter hire above-attached	52,563.94	
Inventories—Consumables per attached Statements:		
Delivery on Bareboat Contracts		127,808.80
Redelivery from Bareboat Contracts	123,151.28	

		Dr.	Cr.
Additional Charter Hire adjustments under G. O. 60 Item 21 giving effect to Latent Defects, Vessel Deficiencies and Expendable Equipment Inventories pending negotiations with Dept. of Commerce, per attached schedules		42,453.18	
Statement of unpaid Public Vouchers covering General Agents compensation, liquidation fees, and purchase contract items		88,541.42	
Allowance for incompleted repairs SS. *Patrick S. Mahoney* per addendum to condition survey on redelivery of vessel, not billed us by Maritime Commission:			
Repairs allowance	4,000.00		
59 Expenses G. O. 60 Supp. 5:			
Charter Hire	532.50		
Misc. Expenses	400.00		4,932.50
(Included in G. O. 60 Supp. 21 Additional Charter Hire)			
U. S. M. C. Bill 4/20/50—No. 010-171 Redelivery repairs allowance SS. *Joseph C. Lincoln*			1,141.25
Additional charter hire on above item @ 75%		855.94	
		307,565.76	429,851.75
BALANCE DUE		122,285.99	
		429,851.75	429,851.75

60 STOCKARD STEAMSHIP CORPORATION

Steamship Owners, Operators and Agents
17 Battery Place
New York 4, N. Y.

March 17, 1953

Mr. J. G. Barkan, District Comptroller
U. S. Department of Commerce
Maritime Administration
45 Broadway
New York, N. Y.

Dear Sir:

Re: Amended Report General Order 60 Supplement 21
Contracts WSA 12933 and MCc 41728

We are enclosing herewith in sextuplicate amended report prepared as at December 31, 1952 covering the above contracts for the period May 1, 1946 to December 31, 1949. We are also enclosing herewith in sextuplicate statement taking into consideration preliminary payments, diversion charges and overage and shortage expendible inventory indicating a net balance due you of $68,459.36. Our check No. 48941 to the order of the Treasurer of the United States (Maritime) is enclosed herewith for $68,459.36.

This remittance is on account of additional charter hire due the Maritime Administration and is subject to adjustment upon the completion of final accounting between the Charterer and the Maritime Administration and that neither the tender of such payment by the Charterer, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of either party under the terms of the agreements involved or otherwise.

Very truly yours,

STOCKARD STEAMSHIP CORPORATION

E. M. SLOMAN
Comptroller

EMS:bw
enc.

61 STOCKARD STEAMSHIP CORPORATION

U. S. Department of Commerce—Maritime Administration
45 Broadway, New York, N. Y.

Contracts Nos. WSA 12933 and MCc 41728

Settlement of Additional Charter Hire under above contracts period May 1, 1946 to December 31, 1949 per General Order 60, Supplement 21, Report amended to December 31, 1952:

Contract 203—46		418,280.66
" 303—46		157,923.84
" 303—47		1,288,359.37
" FTA—47		51,149.61
" FTA—48		248,144.07
" FTA—49		224,190.66
Payment on Account per preliminary reports rendered:		
Contract 203—46	421,426.50	
" 203—46	156,254.86	
" 303—47	1,112,447.99	
" FTA—47	35,448.54	
" FTA—48	292,166.67	
" FTA—49	120,460.46	
	2,138,205.02	2,388,048.21
Payment made 2/28/51 Ck # 34608	122,285.99	
Diversion Charges as per Public Vouchers audited by Maritime Administration	36,975.99	
Balance Overage & Shortage Expendible Inventories used in calculation of Additional Charter Hire in Amended General Order 60, Supplement 21 Report Subject to Audit per attached schedule	22,121.85	
	2,319,588.85	2,388,048.21
Remittance herewith	68,459.36	
	2,388,048.21	2,388,048.21

[March 17, 1953]

62

June 23, 1953

MR. J. G. BARKAN, DISTRICT COMPTROLLER
U. S. Department of Commerce
Maritime Administration
45 Broadway
New York, N. Y.

Dear Sir:

Re: Amended Report General Order 60 Supplement 21—Contracts WSA-12933 and MCc 41728

We refer to our letter to you of March 17 wherein we submitted amended additional charter hire report prepared under the above contracts as at December 31, 1952 covering the period May 1, 1946 to December 31, 1949. With the submission of this report we forwarded you our check No. 48941 to the order of the Treasurer of the United States (Maritime) amounting to $68,459.36 which took into consideration balance of overage and shortage expendible inventories subject to audit by your organization amounting to $22,121.65 in our favor. Since rendering this report, the overage and shortage expendible inventories have been audited by your organization and certificates signed and accepted by both parties to the agreement.

We have now received three (3) invoices from your Washington office covering shortages indicated by the audit of the inventories, and in this connection we now enclose herewith statement showing adjusted additional charter hire due us after giving effect to the corrected inventory figure of $1,372.75. This statement also takes into consideration the total inventory shortage together with another inventory adjustment, the *SS. Arunah S. Abell*, amounting to $432.00 making a net balance due you of $8,018.01 for which we enclose our check No. 50065 payable to the order of the Treasurer of the United

63 States (Maritime). We also enclose herewith in sextuplicate adjusted charter hire statement which will substantiate the amended figures shown in our settlement statement also enclosed herewith.

Copies of your Washington invoices, as follows, are also enclosed in order to enable you to properly credit our account in settlement:

1. June 5, 1953—	Invoice No.	312-236.....	$2,202.39
2. June 16, 1953—	" "	312-260.....	4,118.87
3. June 16, 1953—	" "	312-261.....	2,637.50

This remittance is on account of additional charter hire due the Maritime Administration and is subject to adjustment upon the completion of final accounting between the Charterer and the Maritime Administration and that neither the tender of such payment by the Charterer, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of either party under the terms of the agreements involved or otherwise.

Very truly yours,

St[illegible]rd Steamship Corporation

E. M. Sloman
Comptroller

EMS:bw
enc.

U. S. Department of Commerce—Maritime Administration
45 Broadway, New York, N. Y.

Contracts Nos. WSA—12933 and MCc 41728

Settlement of Additional Charter Hire under above contracts periods May 1, 1946 to December 31, 1949 per General Order 60 Supplement 21 Report rendered 3/17/53 adjusted to include approved Expendible Delivery and Redelivery Inventories per attached statement:

Contract 203—46		416,958.52
303—46		156,471.15
303—47		1,274,154.25
FTA—47		50,480.93
FTA—48		244,408.47
FTA—49		222,080.29
Payments on Account per preliminary reports rendered:		
Contract 203—46	421,426.50	
303—46	156,254.86	
303—47	1,112,447.99	
FTA—47	35,448.54	
FTA—48	292,166.67	
FTA—49	120,460.46	
	2,138,205.02	2,364,553.61
Payment made 2/28/51 check #34608	122,285.99	
Diversion charges as per Public Vouchers Audited by Maritime Admin.	36,975.99	
Payment made 3/17/53 check #48941	68,459.36	
	2,365,926.36	2,364,553.61
Refund Additional Charter Hire due us		1,372.75
	2,365,926.36	2,365,926.36
Additional Charter Hire due as above	1,372.75	
Overage & Shortage Inventory Certificates U. S. Dept. of Commerce Invoices:		
6/ 5/53—MV Becket Hitch Inv. #312-236		2,202.39
6/16/53—Various Inv. #312,261		2,637.50
6/16/53—Various #312-260		4,118.87
Adjustment opening Inventory SS. *Arunah S. Abell*		432.00
	1,372.75	9,390.76
Balance due	8,018.01	
	9,390.76	9,390.76

Exhibit 4

MARITIME'S NOTICE OF THE COMPLETION OF FINAL AUDIT

45 Broadway
New York 6, New York

QM217/L25-6-2:43002(EAB)

July 15, 1955

STOCKARD STEAMSHIP CORPORATION
17 Battery Place
New York 4, New York
Attention: Mr. E. M. Sloman, Comptroller

Gentlemen:

Subject: Accountings (as amended to December 31, 1953) Submitted Pursuant to General Order 60, Supplement 21 Covering Operations Under WARSHIPDEMISEOUT 203 Contract WSA-12933, SHIPSALESDEMISE 303 Contract MCc-41728 and the Foreign Trade Addendum to Contract MCc-41728 For the Period May 1, 1946 to December 31, 1949

With reference to the subject accountings, our revised report dated June 25, 1954, as supplemented May 20, 1955, (Copy No. 1 attached) incorporating our adjustments to the amended accountings submitted by you, has been approved. Appropriate provision has been made for possible subsequent adjustment.

It has been determined that there is due to the Maritime Administration from operations under the subject agreements during the period cited, additional charter hire in the total amount of $2,428,516.42, less any amounts that have heretofore been paid on account thereof or otherwise officially credited.

As the result of this office's audit of your accountings, and the review thereof, additional charter hire has been adjusted as shown in the following summary:

66

	"Additional Charter Hire" as Reported in Your Accountings as Amended to 12/31/53	Maritime Administration Adjustments	"Additional Charter Hire" as Adjusted
203—5/1/46 to 12/31/46	$ 416,528.47	$ 2,896.48	$ 419,424.95
303—D/C—9/1/46 to 12/31/46...	155,628.82	10,330.75	165,959.57
303—D/C—1/1/47 to 12/31/47...	1,270,481.33	33,344.39	1,303,825.72
303—FTA—9/1/47 to 12/31/47...	50,068.61	(697.19)	49,371.42
303—D/C—1/1/48 to 3/31/48...	—0—	—0—	—0—
303—FTA—1/1/48 to 12/31/48...	242,039.27	11,367.88	253,307.15
303—FTA—1/1/49 to 12/31/49...	230,674.29	5,953.32	236,627.61
	$2,365,420.79	$63,095.63	$2,428,516.42

Inasmuch as the record of amounts paid by you on account of additional charter hire accrued under the subject contracts is maintained in our Washington office, that office, upon being furnished with a copy of our Report of Audit dated June 25, 1954, as supplemented May 20, 1955, will invoice you for any balance of additional charter hire determined to be due.

Your revised claim, in the total amount of $102,049.00, for post-redelivery overhead expense in connection with operations under the captioned agreements submitted with your letter dated May 3, 1955, pursuant to an agreement reached at a settlement conference here on April 25, 1955, has been reviewed by me and it has been decided that the sum of $80,170.17, plus $13,000.00 to cover the cost of pricing of expendable inventory difference represents, in my opinion, a fair and reasonable allowance for post-redelivery overhead expense in this instance. Therefore, the revised results from operations under the respective bareboat charter contracts, as reflected in the attached Report of Audit, include post-redelivery overhead expense in the total amount of $93,170.17.

The results, as adjusted by this office, from bareboat charter operations under the captioned agreements, are subject to possible further revision in order to take into
67 account (a) applicable adjustments to revenue and expense recorded subsequent to December 31, 1953 and (b) any errors or omissions later noted or developed.

It is requested that you sign and return the attached duplicate of this letter, within fifteen (15) days, as acknowledgment of the receipt of your copy of our report dated June 25, 1954, as supplemented May 20, 1955, and as evidence of your concurrence in our adjustments to your amended accountings. Unless the signed duplicate copy will have been returned within the allotted fifteen (15) days, we shall consider the accountings as revised to have been accepted by you and we shall proceed accordingly.

Very truly yours,

(Original Signed) J. G. BARKAN,
District Comptroller.

J. G. BARKAN,
District Comptroller.

Attachment

68

45 Broadway
New York 6, New York

QM217/L25-6-2:43002(EAB)

July 15, 1955

STOCKARD STEAMSHIP CORPORATION
17 Battery Place
New York 4, New York
Attention: Mr. E. M. Sloman, Comptroller

Gentlemen:

Subject: Accountings (as amended to December 31, 1953) Submitted Pursuant to Supplement 21 to General Order 60 covering operations under SHIPSALEDEMISE 303 (MSTS) Contract MCc-62623 and SHIPSALESDEMISE 303 (ECA) Contract MCc-62752 For the Period August 1, 1950 to February 29, 1952.

With reference to the subject accountings, our revised report dated September 17, 1954, as supplemented May 20, 1955 (Copy No. 1 attached) incorporating our adjustments to the amended accountings submitted by you, has been approved. Appropriated provision has been made for possible subsequent adjustment.

It has been determined that there is due to the Maritime Administration from operations under the captioned agreements during the period cited, additional charter hire in the total amount of $121,005.37, less any amounts that have heretofore been paid on account thereof.

As the result of this office's audit of your accountings, and the review thereof, additional charter hire has been adjusted as shown in the following summary:

69

	"Additional Charter Hire" as Reported in your Acctgs.	Maritime Administration Adjustments	"Additional Charter Hire" as Adjusted
303 (MSTS) 8/1/50 to 12/31/50....	$ 3,608.02	$ 986.78	$ 4,594.80
303 (MSTS) 1/1/51 to 12/31/51....	55,888.33	16,751.21	72,639.54
303 (ECA) 1/1/51 to 3/31/51....	—	—	—
303 (MSTS) 1/1/52 to 2/29/52....	17,225.19	26,545.84	43,771.03
	$76,721.54	$44,283.83	$121,005.37

With your letter dated November 1, 1951, you submitted public voucher No. 634 for $15,686.78 representing claim for refund of additional charter hire for the period August 1, 1950 to December 31, 1950. Under date of June 30, 1952, you submitted public voucher No. 644 for $16,048.82, which voucher superseded voucher for $15,686.78 and represented claim for refund of additional charter hire for the extended period August 1, 1950 to December 31, 1951. Subsequently, on May 11, 1954, you submitted revised accountings for the over-all period August 1, 1950 to February 29, 1952 which reflected total additional charter hire accrued to the Administration of $76,721.54, of which, your accountings indicate $49,178.37 had been paid on account, leaving a balance due the Administration of $27,543.17. In view of this indicated indebtedness and the further increase in additional charter hire as reflected in our attached report dated September 17, 1954, as supplemented May 20, 1955, your public vouchers Nos. 634 and 644, for $15,686.78 and $16,048.82, are herewith returned for cancellation.

Since the record of payments by you on account of additional charter hire is maintained in our Washington office, that office, upon being furnished by this office with copies of the subject accountings and our report of audit dated Sep-

tember 17, 1954, as supplemented May 20, 1955, will invoice you for any balance of additional charter hire determined to be due.

The various adjustments made by this office to your accountings have been reviewed with Mr. J. O. Wroldsen, Treasurer, and Mr. E. M. Sloman, Comptroller. At a
70 settlement conference at this office on April 28, 1955, your representatives orally expressed objections to certain of our adjustments. It was agreed you could, if you desired, formalize your exceptions in writing after receiving a typed copy of our audit report. It was further agreed that our reports would not be finalized until there had been received from you a revised statement of post delivery overhead expense. Your revised claim for such expense, totaling $19,914.63, was received with your letter dated May 3, 1955. After review by me, it was decided that $9,382.66 represented a fair and reasonable allowance for post-redelivery overhead expense with respect to the subject agreements and this latter amount has been included in the revised results reflected in the attached report.

The results, as adjusted by this office, from bareboat charter operations under the captioned agreements are subject to possible further revision in order to take into account (a) applicable adjustments to vessel revenue and vessel expense recorded subsequent to December 31, 1953, and (b) any errors or omissions later noted or developed.

It is requested that you sign and return the attached duplicate of this letter, within fifteen (15) days, as acknowledgment of the receipt of your copy of our report dated September 17, 1954, as supplemented May 20, 1955, and as evidence of your concurrence in our adjustments to your amended accountings. Unless the signed duplicate copy will have been returned within the allotted fifteen (15) days, we shall consider the accountings as revised to have been accepted by you and we shall proceed accordingly.

Very truly yours,

(Original Signed) J. G. Barkan,
District Comptroller.

Attachments
EAB/rj

J. G. Barkan,
District Comptroller.

71 IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A. 183-356

AMERICAN FOREIGN STEAMSHIP CORPORATION, *Libelant*,

against

UNITED STATES OF AMERICA, *Respondent*.

Notice of Hearing—Filed September 27, 1955

SIRS:

PLEASE TAKE NOTICE that respondent's exception to the amended libel herein will be brought on for hearing at a Stated Term for Motions of this Court to be held at the United States Court House, Room 506, Foley Square, in the Borough of Manhattan, City of New York, on the 13th day of October, 1955, at 10 o'clock in the forenoon of said day or as soon thereafter as counsel can be heard.

Dated: New York, N. Y.
September 27, 1955.

Yours, etc.,

PAUL W. WILLIAMS
United States Attorney
Proctor for Respondent
Appearing Specially
Office & P. O. Address
607 U. S. Court House
Foley Square
New York 7, N. Y.

To: ARTHUR M. BECKER, ESQ.
MESSRS. FOLEY & STATT
Proctors for Libelant
80 Broad Street
New York 4, N. Y.

Opinion and Order of Palmieri, D. J.—May 11, 1956
Memorandum

PALMIERI, D. J.

These libels present substantially similar questions. They have been brought to recover alleged overpayment of charter hire made to the Maritime Commission. The termination of the charters and the redelivery of the vessels in question by the libelants to the Maritime Commission took place in all cases more than two years before the suits were brought. The United States has filed exceptions to the libels as well as exceptive allegations on the ground that the suits are barred by lapse of time since they were not commenced within two years after the causes of action arose pursuant to Section 5 of the Suits in Admiralty Act, 46 U.S.C. 745.

The issues presented here are substantially the same as those which were decided adversely to the libelants by the Court of Appeals for this circuit in two recent cases. *Sword Line, Inc.* v. *United States*, Ct. of App., 2d Cir., Docket #23723, February 24, 1956, *also*, 230 F. 2d 75 (2d Cir. 1956), 228 F. 2d 344 (2d Cir. 1955); *American Eastern Corp.* v. *United States*, Ct. of App., 2d Cir., Docket #23921, April 19, 1956, *affirming*, 133 F. Supp. 11 (S.D.N.Y. 1955). The impact of these decisions is that the causes of action, if any, accruing to the libelants with respect to any payments made to the Maritime Commission arose upon redelivery of the vessels. The position consistently taken by the Government in these cases and justified by the authorities, has been that any payments made after redelivery
73 of the vessels (the charters being thereby terminated) must be deemed to have been made voluntarily regardless of any accompanying protests. See *Union Pacific R. R.* v. *Board of County Commrs*, 98 U.S. 541 (1879); *Cunard Steamship Co.* v. *Elting*, 97 F. 2d 373 (2d Cir. 1938). Therefore, even though the dates of the libelants' alleged overpayments are not stated in their libels, it is clear that those for which recovery can be maintained must have antedated the redelivery dates, as subsequent payments are not recoverable. And since all of the rede-

livery dates here were more than two years prior to the suits in question, any suits for payments made prior to these redelivery dates are barred by the statute indicated.[1]

After the argument of the respondent's motions in support of the exceptions, the libelants in all the cases except *American-Foreign Steamship Corporation* v. *United States* moved for leave to amend the libels in substantially three respects so as to allege: First, that pursuant to an agreement with the respondent all payments were tentative and subject to a final adjustment by audit; second, that the funds paid were "trust funds" held by the respondent as such for subsequent refund pursuant to an eventual audit by the Maritime Commission; and third, that within two years last past refunds by the respondent became due and payable to the libelants. Clearly, the last proposed amendment is nothing more than a legal conclusion and need not be considered. In point of fact, however, this amendment as well as the other two proposed amendments were, in effect, urged in the *American Eastern Corp.* v. *United States* case, *supra*, and were there rejected and held to have failed to impart any validity to the libels. It happens that the counsel for all the libelants here, except *American-Foreign Steamship Corporation*, were also counsel for *American Eastern Corp.* in the District Court and
74 in the Court of Appeals. I have compared the amendments urged there and here and they are substantially the same. The only material difference between the proposed amendments which libelants seek to incorporate in the respective libels now before this Court, and the proposed amended libel in *American Eastern Corp.* v. *United States, supra*, is that the libelants now propose the following additional allegations:

> "• • • The preliminary payments of charter hire made by libelant were deposited as 'unearned moneys' in a trust account and there retained to be refunded after completion of audit. Within two years last past,

[1] The actual redelivery dates are set forth in the libels in the *American-Foreign Steamship Corporation* and *Luckenbach Steamship Company* cases; in the remaining cases they are set forth in the Government's exceptive allegations. Their accuracy has not been disputed.

refunds by respondent became due and payable to libelant pursuant to such agreement."

But the "trust acount" argument was urged by counsel for the libelants when they represented *American Eastern Corp.* before the Court of Appeals and it was clearly rejected by the Court. This point was urged after the argument before the Court of Appeals by letter addressed to the Clerk of that Court and which the Clerk was requested to bring to the attention of the Court. A reply to this letter was submitted to the Court thereafter by the United States on April 10, 1956.

Counsel for the libelants suggested upon the argument that perhaps this point has not been treated with the same degree of thoroughness as might have been the case if the point had been raised in the briefs and argued when the appeal was submitted. I cannot agree. Moreover, I consider the decision of the Court of Appeals in this matter to be binding authority upon me.

Counsel for the libelants suggested upon the argument that perhaps a decision on these motions might be held in abeyance pending possible decisions by the Supreme Court in the *American Eastern* and *Sword Line* cases, *supra*, or in *Smith-Johnson Steamship Corp.* v. *United States*, de-
75 cided by the U. S. Court of Claims March 6, 1956, involving substantially the same issues. In view of the clear and unequivocal position taken by the Court of Appeals in this matter, I can see no valid basis for postponing my decision.

Accordingly, the motions for leave to amend the libels are denied. The exceptive allegations, and the exceptions in the *American-Foreign Steamship Corporation* and *Luckenbach Steamship Company* cases, are sustained. The cross-motion by American Foreign Steamship Corporation to dismiss its own amended libel for lack of jurisdiction of the district court over the subject matter is denied on the authority of the *American Eastern* and *Sword Line* cases, supra.

Settle orders on notice.

Dated: May 11, 1956.

EDMUND L. PALMIERI
U. S. D. J.

Order Dismissing Amended Libel of American-Foreign Steamship Corporation—May 21, 1956

The respondent herein having excepted to the amended libel herein and libelant having moved to dismiss the amended libel for lack of jurisdiction of the District Court over the subject matter of this suit and said exception and motion having thereafter been duly brought on for hearing before this Court on April 3, 1956.

Now on reading and filing respondent's notice of hearing dated March 23, 1956, the amended libel herein and respondent's exception thereto, libelant's notice of motion dated March 29, 1956, the affidavit of John E. Griffith, sworn to April 2, 1956, the affidavit of Melvin Spaeth, sworn to April 2, 1956, and the affidavit of Arthur M. Becker, sworn to April 28, 1956 and after hearing Arthur M. Becker, Esq. and Foley, James & Conran, Esqs., (Arthur M. Becker, Esq., of counsel), proctors for the libel-
76 ant and Paul W. Williams, United States Attorney (Benjamin H. Berman, Esq., Attorney, Department of Justice, of counsel), proctor for the respondent, and due deliberation having been had by the Court and the Court having filed its opinion dated May 11, 1956; it is

ORDERED that libelant's motion to dismiss the amended libel for lack of jurisdiction of this Court over the subject matter of this suit be and the same hereby is denied; and it is

FURTHER ORDERED that respondent's exception be and the same hereby is sustained; and it is

FURTHER ORDERED that the amended libel be and the same hereby is dismissed with prejudice and without leave to libelant to file a further amended libel.

Dated: New York, N. Y.
May 21, 1956

(s) EDMUND L. PALMIERI
United States District Judge

77 IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A. 183-200

STOCKARD STEAMSHIP CORPORATION, *Libelant,*
against
THE UNITED STATES OF AMERICA, *Respondent.*

Order Denying Libelant's Motion to Amend Libel, Sustaining Exceptive Allegations, and Dismissing Libel—May 21, 1956

The respondent herein having filed exceptive allegations directed to the libel herein and said exceptive allegations having been duly brought on for hearing before this Court on April 3, 1956 and libelant having thereafter moved this Court on April 24, 1956, for leave to amend the libel herein and said motion having duly come on to be heard before this Court on May 3, 1956,

Now on reading and filing respondent's notice of hearing dated March 23, 1956, the libel herein, respondent's exceptive allegations and libelant's notice of motion dated April 24, 1956, to amend the libel herein and after hearing Zock, Petrie, Sheneman & Reid, Esqs. (J. Franklin Fort, Esq. and John Cunningham, Esq., of counsel) proctors for the libelant and Paul W. Williams, United States Attorney (Benjamin H. Berman, Esq., Attorney, Department of Justice, of counsel), proctor for the respondent, and due deliberation having been had by the Court and the Court having filed its opinion dated May 11, 1956; it is

On motion of Paul W. Williams, United States Attorney, proctor for the respondent herein,

ORDERED that libelant's motion for leave to amend the libel herein be and the same hereby is denied; and it is

78 FURTHER ORDERED that respondent's exceptive allegations be and the same hereby are sustained; and it is

FURTHER ORDERED that the libel herein be and the same hereby is dismissed with prejudice.

Dated: New York, N. Y.
May 21, 1956

EDMUND L. PALMIERI
United States District Judge

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Admiralty
Docket No. 188-69

BLIDBERG ROTHCHILD CO., INC., 80 Broad Street, New York 4, New York

against

THE UNITED STATES OF AMERICA, in causes of contract, civil and maritime, respectfully alleges upon information and belief, as follows:

Libel of Blidberg Rothchild Co., Inc.—Filed April 13, 1956

FIRST CAUSE OF LIBEL

FIRST: Libelant, Blidberg Rothchild Co., Inc., is a corporation organized and existing under the laws of the State of Delaware, having its principal office and place of business at 80 Broad Street, New York 4, New York.

SECOND: Now and at all times herein mentioned, respondent, the United States of America, is and was a sovereign and has consented to be sued under the provisions of the Suits in Admiralty Act, 41 Stat. 525, 46 U.S.C. 741 *et seq.* The respondent's actions, hereinafter referred to, were taken, successively, through its agencies, the War Shipping Administration, the United States Maritime Commission, and the Maritime Administration of the Department of Commerce, hereinafter called, respectively, WSA, the Commission, and the Administration.

THIRD: Libelant made application to WSA pursuant to Public Law 101, 77th Congress (55 Stat. 242, 50 U.S.C.A. App. §§ 1271 *et seq.*) to charter vessels on an interim basis pending initiation of the chartering program authorized by section 5 of the Merchant Ship Sales Act of 1946 (60 Stat. 43, 50 U.S.C.A. App. §1738). The application was approved and as of June 25, 1946, libelant and respondent entered into bareboat Charter No. WSA-13104, a
80 copy of which will be exhibited at the trial of the case. Libelant instituted operations thereunder on July 11, 1946, when the SS U.S.O. was delivered to it under that charter.

FOURTH: At respondent's invitation, libelant made application to the Commission under the Ship Sales Act and the related regulations (46 CFR 299.31 and 299.81) to charter certain war-built vessels from respondent. The application was approved, and as of September 4, 1946, libelant and respondent entered into Contract No. MCc-41814, a copy of which will be exhibited at the trial of the case. Libelant conducted operations thereunder from October 30, 1946, when the first vessel, the SS FREDERIC A. KUMMER, was delivered to it under that charter, until November 28, 1949, when it redelivered the last vessel, the SS OMAR E. CHAPMAN, to respondent.

FIFTH: Section 5 of the Ship Sales Act sets forth the terms on which the Commission was authorized to charter war-built vessels on a bareboat basis to citizens of the United States. Paragraph (e) of that section provides that section 709 of the Merchant Marine Act, 1936, (49 Stat. 2010, 46 U.S.C. 1199) shall be applicable to charters made under said section 5. Paragraph (a) of section 709 provides that half the charterer's cumulative net profits in excess of a 10% return on the capital necessarily employed in the business of the chartered vessels shall be paid to the respondent as "additional charter hire".

SIXTH: Provisions substantially identical to those in said section 709(a) were included in the Commission's General Order 60 of April 13, 1946, [11 F.R. 4459, 46 CFR 299.31(g)] which provisions were in effect throughout the period covered by said Contract No. MCc-41814.

SEVENTH: The said contracts were drafted by respondent.

81 Clause 13 of Contract No. MCc-41814 provided for a sharing with the Commission of the profits from the charter operations through payment to the Commission of additional charter hire at rates ranging from 50% to as high as 90%. Libelant was required, over its protest, to agree to the unlawful provisions of clause 13 as a condition precedent to the allocation of vessels to it under charter.

EIGHTH: From time to time prior to February 21, 1950, the date of its final-accounting regulations, the Commission issued instructions and regulations covering the char-

terers' preparation and submission of preliminary accountings and payments on account of additional charter hire. The charterers were thereby directed to submit periodic financial statements covering their operations of the chartered vessels, and to make preliminary payments to the Commission of a portion of the amounts thus indicated to be due on account of additional charter hire. It was expressly provided that all accountings were tentative and preliminary as respects both libelant and respondent, and were subject, first to initial audit as submitted and thereafter to final audit by the Commission after operations under the charter were terminated and all items of income and expense were known.

NINTH: Clause 13 of the said contracts provided that such preliminary payments were subject to adjustment upon completion of final audit by respondent, and that any overpayments would be refunded to the charterer at that time. Respondent's instructions and regulations, and its correspondence and course of dealings with the charterers, including this libelant, unvaryingly confirm that this was the understanding of the parties to these charter arrangements.

TENTH: In accordance with charter clause 13 and the respondent's instructions and regulations, libelant periodically rendered tentative accountings and made preliminary payments on account of additional charter hire under said contracts. As such accountings were cumulative
82 and subject to adjustment from period to period, the balance of accounts between libelant and respondent was constantly changing. Libelant made preliminary payments on account of additional charter hire accruing under Contracts WSA-13104 and MCc-41814 in the net aggregate amount of $1,037,964.

ELEVENTH: On October 19, 1951, libelant submitted to defendant a final accounting covering its operations under said contracts, which final accounting was reviewed, audited, and adjusted, first by the Administration's Atlantic Coast District Comptroller, in New York, and thereafter by its auditors in Washington, D. C. By letter of April 16, 1954, the District Comptroller notified libelant that his audit report covering said contracts had been

approved, subject, however, to further adjustment to take into account any applicable items recorded subsequent to December 31, 1951, the settlement of expendable equipment inventories, post redelivery overhead expenses (except the cost of pricing expendable equipment inventories), an adjustment in respect of certain agency fees, and the exclusion of lay-up expenses on one of the chartered vessels.

TWELFTH: In connection with its preliminary accountings, libelant over its protest and as a condition of continued use of the vessels, was required by respondent to make payments on account of additional charter hire under Contract No. MCc-41814 at rates not permitted by, and in fact contrary to, section 709 of the Merchant Marine Act, 1936, section 5 of the Ship Sales Act, and the applicable regulations. The amount thus accrued and paid was greater by approximately $268,000 than the amount which would have accrued at the 50% rate of profit-sharing sanctioned by and lawfully applicable under the relevant statutory provisions and regulations. Although duly demanded by libelant after completion of the final audit, respondent has refused and continues to refuse to make refund of such overpayments of additional charter hire thus unlawfully exacted, notwithstanding that charter clause 13 and the respondent's regulations expressly state that all payments on account of additional charter hire shall be preliminary and subject to adjustment and that any overpayments will be refunded by respondent upon the completion of final audit.

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THIRTEENTH: By reason of the premises, respondent has unlawfully exacted from libelant and has wrongfully appropriated to its own use the sum of approximately $268,000, as nearly as can be determined at the present time, which sum has been demanded and is due and owing by respondent to libelant and is unpaid.

FOURTEENTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE libelant prays judgment against the respondent on this first cause of libel in the amount of $268,000, together with the costs of suit herein.

SECOND CAUSE OF LIBEL

Libelant respectfully alleges as its second cause of libel as follows:

FIRST: Libelant hereby refers to, and by such reference incorporates herein as if set forth at length, all allegations contained in Articles FIRST to SIXTH and EIGHTH to ELEVENTH, inclusive, of its first cause of libel hereinbefore set forth.

SECOND: While libelant was operating a number of vessels under said Contract No. MCc-41814, the Commission, in mid-August 1947, required all charterers, including libelant, as a condition to the continued use of Government vessels, to execute an addendum (called Foreign Trade Addendum) providing that additional charter hire with respect to voyages commenced on or after September 1, 1947, should be computed, accounted for, and paid separately from voyages commenced prior thereto.

84 THIRD: Said action requiring separate accounting for voyages commencing on or after September 1, 1947, was not in fact intended by the Commission as a bona fide termination of the charters in any respect, but was rather an attempt by it to prevent libelant from offsetting prospective losses on voyages commenced on or after September 1, 1947, against profits realized by it from voyages commenced during the first eight months of said year. Such purported termination was arbitrary, designed to circumvent, and contrary to the express calendar-year cumulative accounting provisions of the applicable statutes, regulations, and the charter. The action was without legal or other justification, and was therefore void.

FOURTH: As a result of the improper division of the calendar year 1947 into two accounting periods, libelant has been precluded from offsetting the loss incurred during the last 4 months of that year against the profit realized from voyages commenced during the first 8 months of that year. As a consequence, libelant's additional-charter-hire liability was greater by approximately $48,000 than it would have been had such loss been offset against profits realized from operations during the first 8 months of 1947.

FIFTH: By reason of the premises, respondent has unlawfully exacted from libelant and has wrongfully appropriated to its own use the sum of approximately $48,000, as nearly as can be determined at the present time, which sum has been demanded and is due and owing by respondent to libelant, and is unpaid. This second cause of libel is covered in its entirety by libelant's first cause of libel, and is completely eliminated if such first cause of libel is decided in favor of libelant.

SIXTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE libelant prays judgment against the respondent on this second cause of libel in the amount of $48,000, together with the costs of suit herein.

85 THIRD CAUSE OF LIBEL

Libelant respectfully alleges as its third cause of libel as follows:

FIRST: Libelant hereby refers to, and by such reference incorporates herein as if set forth at length, all allegations contained in Articles FIRST to SIXTH and EIGHTH to ELEVENTH, inclusive, of its first cause of libel and Articles SECOND and THIRD of its second cause of libel hereinbefore set forth.

SECOND: In addition to the purported cut-off at September 1, 1947, the Commission thereafter purported to modify the cumulative-accounting provisions of said section 709(a) and its parallel regulation by the issuance of instructions and final-accounting regulations erroneously interpreting the proviso at the end of said section 709(a) to prohibit the carry-forward of profits resulting from operations in any one year against losses sustained in the charter operations in subsequent years. This ruling was in conflict with the clear language of the statute and the legislative intent which, in recognition of the cyclical nature of ocean transportation, providing for full cumulative accounting over the entire period of the charter operations, with a final settlement of additional charter hire (which

is in essence a profit-sharing plan) after the conclusion of such operations and the completion of the final audit of the charterers' accountings by respondent. The aforesaid proviso was inserted in section 709 merely to assure that the profits of one year in which the respondent already had shared should not be carried forward to subsequent years so as again to be shared by the respondent, and the proviso was not designed (as erroneously interpreted by the Commission) to preclude full cumulative accounting over the entire charter period.

THIRD: In accordance with the aforesaid ruling, the respondent required libelant, over its protest and contrary to the applicable statutes and its April 13, 1946, regulation, to prepare accountings and make tentative payments of charter hire on a basis precluding libelant from offsetting profits realized in one period against losses sustained from operation of the chartered vessels in a subsequent period.

FOURTH: By reason of the premises, respondent has unlawfully exacted from libelant and has wrongfully appropriated to its own use the sum of approximately $75,000, as nearly as can be determined at the present time, which sum has been demanded and is due and owing by respondent to libelant and is unpaid.

FIFTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE libelant prays judgment against the respondent on this third cause of libel in the amount of $75,000, together with the costs of suit herein.

FOURTH CAUSE OF LIBEL

Libelant respectfully alleges as its fourth cause of libel as follows:

FIRST: Libelant hereby refers to, and by such reference incorporates herein as if set forth at length, all allegations contained in Articles FIRST to SIXTH and EIGHTH to ELEVENTH, inclusive, of its first cause of libel hereinbefore set forth.

SECOND: By charter clauses 13 and 23, respondent's final-accounting regulations (46 CFR 299.37-4), and the applicable statutory provisions, libelant is entitled to charge as a part of the cost of conducting operations under these charters the fair and reasonable overhead expenses properly assignable or apportionable thereto. In its review of libelant's accountings, libelant has improperly, and contrary to the applicable provisions of the charter, the regulations, and the statutes, reduced libelant's reported overhead expenses by the amount of certain management fees received by libelant. The result of this action was to increase libelant's reported profit and, in turn, its ostensible additional-charter-hire liability in respect of the charter operations.

87 THIRD: By reason of the premises, respondent has unlawfully exacted from libelant and has wrongfully appropriated to its own use the sum of approximately $29,000, as nearly as can be determined at the present time, which sum has been demanded and is due and owing by respondent to libelant, and is unpaid.

FOURTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE libelant prays judgment against the respondent on this fourth cause of libel in the amount of $29,000, together with the costs of suit herein.

FIFTH CAUSE OF LIBEL

Libelant respectfully alleges as its fifth cause of libel as follows:

FIRST: Libelant hereby refers to, and by such reference incorporates herein as if set forth at length, all allegations contained in Articles FIRST to SIXTH and EIGHTH to ELEVENTH, inclusive, of its first cause of libel, and Article SECOND of its fourth cause of libel, hereinbefore set forth.

SECOND: In making its review of libelant's accounting, respondent has refused to allow to libelant as a part of fair and reasonable overhead expenses certain overhead expenses incurred by libelant after redelivery of the char-

tered vessels. Such refusal was in contravention of the applicable provisions of the charter, the regulations, and the statutes, and served to increase libelant's ostensible additional-charter-hire liability by approximately $10,600.

THIRD: By reason of the premises, respondent has unlawfully exacted from libelant and has wrongfully appropriated to its own use the sum of approximately $10,600, as nearly as can be determined at the present time, which sum has been demanded and is due and owing by respondent to libelant and is unpaid.

FOURTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE libelant prays judgment against the respondent on this fifth cause of libel in the amount of $10,600, together with the costs of suit herein.

88 SIXTH CAUSE OF LIBEL

Libelant respectfully alleges as its sixth cause of libel as follows:

FIRST: Libelant hereby refers to, and by such reference incorporates herein as if set forth at length, all allegations contained in Articles FIRST to SIXTH and EIGHTH to ELEVENTH, inclusive, of its first cause of libel hereinbefore set forth.

SECOND: There were latent defects in many of the chartered vessels, which defects existed when the respective vessels were delivered to libelant. It was the obligation of respondent under the charter to reimburse libelant in full for the cost of repairing such defects.

THIRD: To keep the vessels in operation, libelant was required to incur and pay for various items of repair expense necessitated by such latent defects, such expenditures amounting to approximately $44,000.

FOURTH: Libelant in its accounting to respondent made claim for refund in their entirety of these expenditures for repairs, but respondent, contrary to the charter and its regulations, ruled that such expenses were chargeable to

voyage accounts merely as routine operating expenses and has refused to pay for or to allow full credit for such expenditures against the additional charter-hire accruals.

FIFTH: By reason of the premises, respondent has unlawfully exacted from libelant and has wrongfully appropriated to its own use the sum of approximately $44,000, as nearly as can be determined at the present time, which sum has been demanded and is due and owing by respondent to libelant and is unpaid.

SIXTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE libelant prays judgment against the respondent on this sixth cause of libel in the amount of $44,000, together with the costs of suit herein.

* * * * * *

89 WHEREFORE libelant prays that upon service of a copy of this libel on the United States Attorney for this district, and the mailing of a copy thereof to the Attorney General of the United States, in accordance with law, respondent, the UNITED STATES OF AMERICA, be required to appear and answer all and singular the matters aforesaid, according to the principles of law and rules of practice obtaining in like cases between private parties, and that this Honorable Court will be pleased to decree to your libelant damages as follows:

On the First Cause of Libel	$268,000
On the Second Cause of Libel	$ 48,000
On the Third Cause of Libel	$ 75,000
On the Fourth Cause of Libel	$ 29,000
On the Fifth Cause of Libel	$ 10,600
On the Sixth Cause of Libel	$ 44,000

together with such interest as is allowable thereon for delay in payment thereof, as well as costs, and that your libelant may have such other and further relief as in law and justice it may be entitled to receive. The amounts demanded as above set forth in the several causes of libel are subject to such adjustment and modification as audit may disclose to be required in the event certain causes of

libel are sustained, which have the effect of diminishing the amount in other causes of libel, all of which will be demonstrated at the trial of this case.

ZOCK, PETRIE, SHENEMAN & REID
Office and P. O. Address
52 Broadway
New York 4, New York

KOMINERS & FORT
Office and P. O. Address
Tower Building
1401 K Street, N. W.
Washington 5, D. C.

Proctors for Libelant

90 *Duly sworn to by*
Hilding Goranson
jurat omitted in printing

---

91 IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Ad. 188-69

BLIDBERG ROTHCHILD CO., INC., *Libelant,*

against

UNITED STATES OF AMERICA, *Respondent.*

Respondent's Exception to Libel of Blidberg Rothchild Co., Inc.—Filed August 3, 1956

SIRS:

PLEASE TAKE NOTICE that the respondent, appearing specially, hereby excepts to the libel herein on the following grounds:

(1) The libel fails to state a cause of action within the jurisdiction of this Honorable Court.

(2) This Honorable Court lacks jurisdiction over the subject matter of this suit and over the respondent by reason of the failure of the libelant to commence

the suit within two years after November 28, 1949, the date on which the alleged causes of action arose, as required under Section 5 of the Suits in Admiralty Act of March 9, 1920, as amended, 46 U.S.C. 745.

Dated: New York, N. Y.
August 3, 1956

Yours, etc.,

PAUL W. WILLIAMS
United States Attorney
Proctor for Respondent
Appearing Specially
Office & P. O. Address
607 U. S. Court House
Foley Square
New York 7, N. Y.

To: ZOCK, PETRIE,
SHENEMAN & REID, ESQS.
Proctors for Libelant
52 Broadway
New York 4, N. Y.

92 KOMINERS & FORT, ESQS.
Proctors for Libelant
Tower Building
14th & K Streets, N. W.
Washington 5, D. C.

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93 IN UNITED STATES DISTRICT COURT

Affidavit of Sylvester E. Rothchild—September 7, 1956

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

SYLVESTER E. ROTHCHILD, being duly sworn, deposes and says:

1. I am and since prior to June 1946 have been President of Blidberg Rothchild Co. Inc., (herein called Blidberg), a Delaware corporation with principal office at 80 Broad Street, New York 4, New York, and am familiar with the facts hereinafter set forth.

2. Blidberg and the United States Maritime Commission executed Contract No. WSA-13104, effective as of June 25, 1946. The first vessel, the SS *USO*, was delivered to Blidberg under that charter on July 11, 1946. The United States Maritime Commission and its successor, the Maritime Administration of the Department of Commerce, will be referred to herein as Maritime.

3. As of September 4, 1946, Blidberg and Maritime executed Contract No. MCc-41814, under which charter Blidberg continued the operations previously instituted by it under Contract No. WSA-13104. Operations were conducted under Contract No. MCc41814 from October 30, 1946, when the SS *Frederic A. Kummer*, was delivered to Blidberg under that charter, until November 28, 1949, when it redelivered the last vessel, the SS *Omar E. Chapman*, to Maritime.

4. On April 19, 1954, Blidberg received a letter from Maritime, dated April 16, 1954, notifying Blidberg that Maritime had completed its audit of Blidberg's accountings covering operations under the above-numbered contracts, subject however to further revision to take into account certain items therein specified.

94 5. Blidberg filed its libel against the United States to recover additional charter hire overpaid under the said contracts on April 13, 1956; Southern District of New York, Docket No. A. 188-69.

6. Blidberg made payments of additional charter hire under these contracts on various dates between December 30, 1946, and February 8, 1952, in the net aggregate amount of $1,037,964.72. Maritime made two interim refunds in 1948, the last of which, in the amount of $18,921.19, was paid to Blidberg on May 12, 1948. Blidberg's last payment on account of additional charter hire, in the amount of $31,310.44, was transmitted to Maritime on February 8, 1952, with Blidberg's supplementary accounting also transmitted on that date.

7. In addition to the payments and refunds on account of additional charter hire referred to in the next preceding paragraph, Maritime exacted further payments from Blidberg by withholding from it moneys due Blidberg under a

certain General Agency Agreement, Contract No. MA-50, as herein set forth in paragraphs 8 to 10, inclusive.

8. By letter of April 28, 1954, addressed to Maritime, Blidberg reiterated its protest as to certain matters in dispute and bearing on the calculation of additional charter hire, observing therein that "We will submit very shortly an accounting statement prepared in accordance with the proper and correct methods of accounting under the law and the contract and a request for reimbursement of overpayments heretofore required by the Maritime Administration." And on May 27, 1954, it submitted its voucher requesting refund of such overpayments in the amount of $168,347.37. This request was refused by Maritime; see letter of November 3, 1954, from Maritime, which concludes with the statement that "we cannot accept your claim for refund and we are, therefore, returning, herewith, your voucher in the amount of $168,347.37 for cancellation."

95 9. Maritime, on the contrary, submitted vouchers to Blidberg as follows:

207-284, dated January 24, 1952	$103,652.92
411-142, dated May 17, 1954	90,815.86
Total	$194,468.76

representing underpayments of additional charter hire alleged by Maritime to have accrued to it under Contracts Nos. WSA-13104 and MCc-41814 for the period of July 1, 1946 to November 30, 1949.

10. To collect such asserted indebtedness for additional charter hire, Maritime instructed the Atlantic Coast District Comptroller to withhold payment of amounts otherwise due to Blidberg under the referred-to General Agency Agreement, Contract No. MA-50. Pursuant to this instruction, Maritime collected by such withholding a total of $17,725. On August 18, 1955, however, Maritime discontinued the withholding of such GAA moneys, and delivered to Blidberg a check for $17,725 in payment of the vouchers in respect of which it previously had withheld that sum. The correspondence exchanged by Maritime and Blidberg respecting these withholdings is annexed hereto, as follows:

Letters from Blidberg to Maritime, dated 12/28/54, 3/18/55, 4/22/55, 5/20/55, 6/22/55, and 7/13/55; and from Maritime to Blidberg, dated 8/5/54, 9/16/54, 12/15/54, 12/30/54, 1/18/55, 2/11/55, 3/22/55, 3/28/55, 4/26/55, 5/26/55, and 7/1/55.

11. By circular of May 14, 1951, addressed "To: Bareboat Charterers", (copy of which was received by Blidberg and is annexed hereto) Maritime instructed that checks submitted by charterers for additional charter hire should not contain a restrictive legend "to the effect that it is a final settlement." The circular emphasized that such remittance by the charterer is "*on account*" of additional charter hire, is subject to adjustment upon the completion of final accounting between the charterer and Maritime, and
96 that neither the tender nor acceptance of such remittance constitutes a waiver of the rights or remedies of either party "under the terms of the agreements involved or otherwise."

12. By letter of April 28, 1954, to Maritime Comptroller, Blidberg protested the results of Maritime's final audit. Specifically it (1) reiterated its insistence that the profits payable to Maritime should not be computed at rates in excess of the 50% specified in the statute; (2) protested the refusal to permit cumulative accounting over the entire period of the charter; (3) protested the accounting cut-off at September 1, 1947. Conformably with this protest, Blidberg submitted a voucher on May 27, 1954, requesting Maritime to refunds $168,347.37 theretofore overpaid on account of additional charter hire. Maritime asserted, on the contrary, that Blidberg was underpaid in respect of additional charter hire, and was still indebted to Maritime on that account in the sum of $194,468.76; by letter of December 15, 1954, Maritime demanded payment by Blidberg of this amount, in default of which a Government-wide set-off payment order would be issued. Blidberg referred to the disputes then pending in connection with its final accountings, and requested that issuance of the set-off payment order be held in abeyance pending the outcome of the discussions of those disputes. To this request, Maritime replied, on December 30, 1954:

> "This office is aware of the questions raised by you with regard to the accountings on which the sub-

ject invoices are based; however, the provisions of the charter agreements are binding upon your Company to pay such amounts as were billed to you with the understanding that refunds will be made of any amounts determined through supplementary accountings, to have been overpaid.

"Accordingly, it is suggested that you remit the amounts presently established as being due the
97 United States for additional charter hire and promptly take the necessary action to finally resolve with our District Comptroller, the questions relating to the accountings previously approved by him. Your rights to recover any amounts which may be determined by such subsequent action to have been overpaid, are reserved to you in the charter agreement.

"Prompt action by your company will avert the placing of a government-wide set-off payment order as contemplated in our letter of December 15, 1954."

Various letters bearing on this matter are annexed to this affidavit, as follows: Letters from Blidberg to Maritime, dated 4/28/54, 5/27/54, and 12/28/54; and letters from Maritime to Blidberg, dated 8/5/54, 9/16/54, 11/3/54, 12/15/54, and 12/30/54.

13. Blidberg's contention that additional charter hire should be computed at the 50 percent rate provided by statute instead of the sliding scale set forth in charter clause 13, involves $267,164.79; the dispute concerning the accounting cut-off at September 1, 1947, involves $48,613.20; and the contention that the results of Blidberg's operations should be accounted for on a cumulative basis over the entire period of the charter involves $74,433.85. The maximum involved if all three of these disputes are decided in favor of Blidberg is $267,664.78.

/s/ SYLVESTER E. ROTHCHILD.

Subscribed and sworn to before me this 7th day of September, 1956.

/s/ CHARLES L. FEIBER,
Notary Public.

My commission expires 3/30/58.

98 **Attachment to Affidavit**

CIRCULAR LETTER FROM MARITIME, MAY 14, 1951

U. S. DEPARTMENT OF COMMERCE
Maritime Administration
Office of the District Comptroller
45 Broadway
New York 6, New York

May 14, 1951

To: Bareboat Charterers (No. 203 and/or No. 303 Agreements)

Subject: Remittances Account of Additional Charter Hire Submitted with Accountings Required Pursuant to Supplement 21 to General Order 60

With respect to the subject matter, it has been noted that in some instances the voucher portion of the check includes language to the effect that the remittance is the final settlement. Furthermore, in some instances voucher checks and non-voucher checks have been used on the reverse side of which (above the space provided for endorsement) appears a printed legend equally as restrictive. Obviously such remittances cannot be accepted on that basis.

Where a voucher check is tendered by the Charterer, it is requested that no reference be made thereon through restrictive legend or otherwise to the effect that it is a final settlement. The accompanying letter of transmittal should state that the remittance is *on account* of additional charter hire due the Maritime Administration and is subject to adjustment upon the completion of final accounting between the Charterer and the Maritime Administration and that neither the tender of such payment by the Charterer, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of
99 either party under the terms of the agreements involved or otherwise. The letter should be signed by an authorized officer of the Charterer.

Where a non-voucher check contains a restrictive legend, the Charterer should delete the restrictive legend and sub-

mit a letter of transmittal incorporating language such as is outlined above, said letter to be signed by an authorized officer of the Charterer.

Kindly give this matter preferred attention.

J. F. KEATING
District Comptroller

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100 **Attachment to Affidavit**

Exhibit 6

Correspondence Showing Maritime's Recognition That Overpayments Were to be Refunded Upon Final Audit and That All Rights Were Reserved by Clause 13

BLIDBERG ROTHCHILD CO. INC.
Ship Operators and Agents
80 Broad Street
New York 4, N. Y.

April 28, 1954

BY HAND

YOUR REF: QM35/L25-6-2:43002 (BAM)

Mr. J. G. Barkan, District Comptroller,
Maritime Administration,
U. S. Department of Commerce,
45 Broadway,
New York 6, New York.

Subject: Accounting Under Bareboat Charter Agreement SHIPSALESDEMISE 303 Contract MCc-41814 and the Foreign Trade Addendum thereto, for the period January 1, 1947 to November 30, 1949

Supplementary Accounting Under Bareboat Charter Agreements WARSHIPDEMISEOUT 203 Contract WSA-13104 and SHIPSALESDEMISE 303 Contract MCc-41814 for the Period July 1, 1946 to December 31, 1946

Dear Sir:

Reference is made to your letter of April 16, 1954, received April 19, 1954, concerning the above accountings.

This letter is to advise you that we do not concur in the unilateral adjustments which your auditors have made
101 in our accountings nor do we accept the accountings as adjusted further. We are returning herewith the duplicate copy of your letter unsigned so that there may be no misunderstanding as to our position.

We repeat and reiterate our prior protest with respect to the accounting theories and rulings heretofore followed by your auditors, and particular protest is made with respect to the following points:

1. The requirement that additional charter hire be paid in excess of the amounts permitted under the law, i.e., all amounts in excess of 50 percent of the profits after an allowance for 10 percent of capital necessarily employed.

2. The refusal to permit cumulative accounting for the entire period of operation under the bareboat charters.

3. The requirement that separate accountings be made of additional charter hire for the period before and after September 1, 1947.

4. The failure to make reimbursement to Blidberg Rothchild Co. Inc., for various repairs, including those caused by latent defects which are for the account of the Maritime Administration.

5. The formula used in the definitions with respect to computing capital necessarily employed and net voyage profit.

6. The arbitrary limtations of allowable post-redelivery overhead.

7. The disallowance from income from other operations of the profit portion of fees earned from managing ships owned by others.

It is our contention that the position taken by the Maritime Administration with respect to each of the
102 above items and other problems not here listed is erroneous either under the bareboat charter contract or the applicable provisions of the Merchant Ship

Sales Act, 1946, and the Merchant Marine Act, 1936. For that reason, we cannot accept your determinations with respect to these disputes nor the adjustments mentioned in your letter of April 16, 1954.

We will submit very shortly an accounting statement prepared in accordance with the proper and correct methods of accounting under the law and the contract and a request for reimbursement of overpayments heretofore required by the Maritime Administration.

Very truly yours,

BLIDBERG ROTHSCHILD CO. INC.

By:

President.

SER:UA
Encl.

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103 **Attachment to Affidavit**

Exhibit 6

U. S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
WASHINGTON 25, D. C.

Address Reply to
Maritime Administration
and Refer to File No.

QM35/L10-5-2:453

December 30, 1954

Blidberg Rothchild Company, Inc.,
80 Broad Street,
New York 4, New York

Gentlemen:

Subject: Invoice 207-284—$103,652.90 (Balance)
Dated January 24, 1952
Invoice 411-142—$ 90,815.86
Dated May 17, 1954

Reference is made to our letter of December 15 and your reply of December 28, 1954, relative to the payment

of the subject invoices for additional charter hire due in accordance with provisions of Clause 13 of the Charter Contracts.

This office is aware of the questions raised by you with regard to the accountings on which the subject invoices are based; however, the provisions of the charter agreement are binding upon your Company to pay such amounts as were billed to you with the understanding that refunds will be made of any amounts determined through supplementary accountings, to have been overpaid.

Accordingly, it is suggested that you remit the amounts presently established as being due the United States for additional charter hire and promptly take the necessary action to finally resolve with our District Comptroller, the questions relating to the accountings previously
104 approved by him. Your rights to recover any amounts which may be determined by such subsequent action to have been overpaid, are reserved to you in the charter agreement.

Prompt action by your company will avert the placing of a government-wide set-off payment order as contemplated in our letter of December 15, 1954.

Very truly yours,

Sgd/ A. R. Boone
Acting Comptroller

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105 IN UNITED STATES DISTRICT COURT

Supplemental Affidavit of Sylvester E. Rothchild—September 10, 1956

State of New York, }
County of New York, } ss.:

Sylvester E. Rothchild, being duly sworn, deposes and says:

1. This supplements my affidavit of September 7, 1956.

2. Under Bareboat Charters Nos. WSA-13104 and MCc-41814, Blidberg Rothchild Co. Inc. made payments on account of additional charter hire to the United States

Maritime Commission and to the Maritime Administration of the Department of Commerce, herein called Maritime, and Maritime made refunds to Blidberg Rothchild Co. Inc. on that account, as follows:

Date	Payment	Refund
December 30, 1946	$157,591.45	
February 27, 1947	40,610.77	
February 28, 1947	36,120.80	
February 28, 1947	11,347.37	
April 1, 1947	56,234.27	
May 17, 1947	7,509.07	
May 14, 1948	21,929.19	
April 1, 1947	44,335.48	
May 6, 1947	6,848.25	
June 6, 1947	33,522.63	
July 3, 1947	244,702.91	
August 1, 1947	45,359.67	
September 9, 1947	105,567.74	
October 3, 1947	95,207.06	
November 7, 1947	9,851.48	
February, 1948		$46,548.71
May 12, 1948		18,921.19
June 3, 1949	3,452.80	

106 *Supplemental Affidavit of Sylvester E. Rothchild*

Date	Payment	Refund
July 1, 1949	$ 4,233.47	
August 4, 1949	18,077.44	
September 7, 1949	3,011.04	
October 12, 1949	707.18	
March 28, 1950	44,617.66	
October 19, 1951	40,368.34	
October 19, 1951	40,918.11	
February 8, 1952	31,310.44	
March 18, 1955	400.00	
April 22, 1955	3,100.00	
May 20, 1955	3,000.00	
June 22, 1955	7,700.00	
July 13, 1955	3,525.00	
August 18, 1955		$17,725.00

3. The five payments made in 1955 were exacted by Maritime through the device of withholding amounts due to Blidberg Rothchild Co. Inc. under a General Agency Agreement, No. MA-50. On August 18, 1955, however, these amounts (totaling $17,725.00) were refunded by Maritime; on that date it discontinued the exaction of such payments by withholding from General Agency moneys, and delivered to Blidberg Rothchild Co. Inc. a check for the entire $17,725 theretofore withheld.

SYLVESTER E. ROTHCHILD.

Subscribed and sworn to before me this 10th day of September, 1956.

CHARLES L. FEIBER
Notary Public

My commission expires March 30, 1958

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107 IN UNITED STATES DISTRICT COURT

Affidavit of H. M. Hermanson

STATE OF WASHINGTON
COUNTY OF KING } ss.:

H. M. HERMANSON, being duly sworn, deposes and says:

1. I am the Assistant Auditor of James Griffiths & Sons, Inc. with offices at 914 Second Avenue, Seattle 4, Washington, and am familiar with the facts hereinafter set forth.

2. James Griffiths & Sons, Inc. entered into bareboat charter agreements with the War Shipping Administration, contract No. WSA-13203, and with the Maritime Administration, contract No. MCc-41865.

3. In connection with the accountings of profits as additional charter hire under these contracts, a dispute arose between the Maritime Administration and James Griffiths & Sons, Inc. concerning the proper construction of certain War Shipping Administration regulations relating to adjustment of liquidation compensation.

4. Annexed hereto are (a) a true copy of a letter dated July 7, 1955 sent by James Griffiths & Sons, Inc. to the Mari-

time Administration, and (b) true copies of letters dated July 9, 1954, May 19, 1955 and July 15, 1955, received by James Griffiths & Sons, Inc. from the Maritime Administration.

H. M. HERMANSON.
H. M. HERMANSON.

Sworn to before me this 6th day of September, 1956.

WILLIAM CHRISTOFFERSEN
Notary Public.

(SEAL)

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108 IN UNITED STATES DISTRICT COURT

Attachment to Affidavit

Exhibit 7

Letter Showing Maritime's Recognition of the Long Time Necessary to Assemble Accounts

U. S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
WASHINGTON 25, D. C.

Address Reply to
Maritime Administration
and Refer to File No.
QM92/L25-6-2:431(HM)

Jul 9 1954

JAMES GRIFFITHS & SONS, INC.
914 Second Avenue
Seattle 4, Washington

Gentlemen:

Subject: Supplemental Accountings Under WARSHIPDEMISEOUT 203, SHIPSALESDEMISE 303 and Foreign Trade Addendum for the Period August 1, 1946 to October 31, 1948

With respect to the subject accountings, you are advised that the report dated December 11, 1953, as adjusted, (copy attached) has been approved, and it has been determined that additional charter hire amounting to $338,778.82 has accrued to the Maritime Administration as a result of your operations under the subject bareboat charter agree-

ments, less any amounts that have heretofore been paid on account thereof.

We have given consideration to the protest contained in your letter dated October 5, 1953 wherein you objected to the adjustment of the Administration's auditor with respect to the WSA liquidation fees. It is your contention that by the act of redelivery of each vessel to the Government, your company was entitled to receive a definite
109 sum of money, not contingent upon future services, and you included the entire liquidation compensation as income at the time of redelivery of each vessel.

The plain language of Section 306.202 of W.S.A. General Order 56, together with the record preceding the adoption of that Order, requires that we reject your contention. In this connection, for convenience of reference, the introductory language of the cited section reads as follows:

> "Section 306.202 *Compensation to General Agents, Agents, and Berth Agents for liquidating the business of vessels.* (a) in addition to the compensation otherwise provided in Sections 306.171 to 306.205, inclusive, General Agents, Agents, and Berth Agents shall be paid for liquidating the business of vessels assigned to them under a standard form of service agreement, GAA, TCA, BA:"

For your information in this connection, in the memorandum of January 31, 1948 from the Assistant Deputy Administrator for Ship Operations to the Administrator of the War Shipping Administration, recommending the adoption of General Order 56, it was stated, among other things, that upon the redelivery of a vessel to the War Shipping Administration, or the constructive or actual total loss of a vessel, the final compensation provided in General Order 34 terminated; that, pursuant to Section 306.98(b) (2) thereof, the Administrator was required to determine fair and reasonable compensation *for services in liquidating the accounts and business of the vessel rendered subsequent to such redelivery or loss;* that it was agreed that the work of liquidation due to failure of foreign subagents to clear accounts and for other reasons would average eighteen months after the date the vessel was redelivered or lost; and that, as the agents had been prevented by recapture proceedings and taxation from

accumulating a reserve from compensation received during the term of operation under agency agreements to
110 *carry them over the liquidation period,* it was proposed to pay the additional compensation provided in the Order as adopted. We feel that the language in General Order 56 and the record preceding its adoption is so crystal-clear on this point that there can be no question that such liquidation compensation was intended to cover services required *after* redelivery or loss of the vessels.

The attached revised accounting is subject to further adjustment to take into account (a) any applicable items recorded subsequent to June 30, 1953 and (b) any errors or omissions later developed.

Very truly yours,

B. W. HARVEY
Chief, Division of Audits

Enclosure

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111 **Attachment to Affidavit**

Exhibit 6

U. S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
WASHINGTON 25, D. C.

Address Reply to
Maritime Administration
and Refer to File No.

QM92/L10-5-2:453

July 15, 1955

JAMES GRIFFITHS & SONS, INC.
914 Second Avenue
Seattle 4, Washington

Attention: Mr. J. D. McMasters,
Secretary

Gentlemen:

Subject: Invoice 108-171—$6,169.29 (Balance)
Dated February 9, 1951

Reference is made to the subject invoice, to our letter of May 19, 1955, and to your reply of July 7, 1955, concern-

ing additional charter hire due the United States pursuant to the provisions of Clause 13, Part II of WARSHIPDEMISEOUT 203 Contract WSA-13203 and SHIPSALESDEMISE 303 Contract MCc-41865, which provisions were quoted in our letter of May 19, 1955.

In your letter of July 7, 1955, you state that you had taken exception to the adjustment of the Administration's Auditor with respect to W. S. A. liquidation fees; you further state that you understand that other steamship companies have taken the same position in this matter and, you have been advised that a similar case is being or will shortly be argued in the Courts, therefore, you are unable to comply with our request for an early settlement of this invoice.

From the provisions of Clause 13 quoted in our letter of May 19, 1955, it is evident that situations such as
112 you point out in your letter were anticipated at the time of entering into the contracts, and in view thereof, provisions were placed in the contracts which would require the charterer to pay additional charter hire to the government on a preliminary basis with a further provision for refunding to the charterer of any overpayments resulting from subsequent adjustments.

In regard to the last paragraph of your letter, this office would not consider it proper to defer collection action because of pending litigation, especially since such litigation is not in connection with this specific case, but would prefer to handle this matter in accordance with Clause 13 of the service agreements.

Therefore, this office would appreciate your remittance to cover the subject invoice with the understanding that if any subsequent action results in credits due your company, the amount of such credits will be promptly refunded.

Very truly yours,

WESLEY C. CLARK
Wesley C. Clark
Chief, Division of Credits
and Collections

113 IN UNITED STATES DISTRICT COURT

Affidavit of C. F. Teese

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

C. F. TEESE, being duly sworn, deposes and says:

1. I am the General Auditor of North Atlantic and Gulf Steamship Company with offices at 120 Wall Street, New York 5, New York, and am familiar with the facts hereinafter set forth.

2. On October 21, 1954 and on December 16, 1954, the North Atlantic and Gulf Steamship Company filed separate libels in the District Court for the Southern District of New York, Nos. Ad. 183-255 and Ad. 184-37, seeking recovery from the United States of overpayments of additional charter hire for vessels bareboat chartered from the United States Maritime Commission under contracts Nos. MCc-41742, MCc-62754 and MA-42. The bases for the libels were (a) that the Maritime Commission and its successor the Maritime Administration had required the North Atlantic and Gulf Steamship Company to pay as additional charter hire a share of the company's profit in excess of the 50 percent prescribed by section 709(a) of the Merchant Marine Act, 1936, and (b) that, in violation of the cumulative accounting requirement of section 709(a) of the Merchant Marine Act, 1936, the Maritime Commission and its successor the Maritime Administration had refused to permit the North Atlantic and Gulf Steamship Company to offset losses in one year as against profits in another year in its accounting for additional charter hire.

3. Notwithstanding the pendency of these two suits, the Maritime Administration demanded that the company continue to make disputed payments of additional charter hire. And when the company called attention to the pendency of the suits and to the fact that the company

114 claimed that it had already paid substantially more than was due, as additional charter hire, the Maritime Administration replied that the company would have to continue to make preliminary payments since they were required by clause 13 of the charter, which further provided that all rights were reserved to the date of final

audit at which time such refunds would be made as would be required.

4. The demands of the Maritime Administration and the statements of the position of the North Atlantic and Gulf Steamship Company are set out in letters from the Maritime Administration to the company, dated July 9, 1954, January 20, 1955, February 9, 1955 and March 8, 1955; and in letters from the North Atlantic and Gulf Steamship Company to the Maritime Administration dated July 1, 1954, January 31, 1955 and February 24, 1955, true copies of which are annexed hereto.

C. F. TEESE.

Sworn to before me this 10th day of September, 1956.

WALTER KLAMMER
Notary Public, State of New York

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115 **Attachment to Affidavit**

Exhibit 6

July 1st, 1954

Mr. C. W. Tucker Comptroller
Maritime Administration
U. S. Department of Commerce
Washington 25, D. C.

Dear Sir:

Subject: Accountings under Bareboat Charter MCc41742

North Atlantic and Gulf Steamship Company, Inc., has rendered accountings and made payments on account of the operations under the above contract in accordance with the accounting requirements and regulations of the U. S. Maritime Commission and its successor, the Maritime Administration. Such accountings and payments were made notwithstanding that the regulations of the Administration were considered by us either to have been misinterpreted or to be contrary to applicable provisions of law. They were thus rendered without prejudice and with full reservation of our rights.

Protest has been heretofore made with respect to the requirement that additional charter hire in excess of 50 percent of the amounts after 10 percent of capital necessarily employed be paid, and to the refusal of the Maritime Administration to permit a cumulative accounting over the entire period of the charter. We reiterate those protests for the reason that such requirements are contrary to provisions of Section 709 of the Merchant Marine Act, 1936, which was incorporated by reference into Section 5 of the Merchant Ship Sales Act, 1946, and made applicable to all charters made pursuant to that latter statute. There are also other respects in which we consider the requirement of the Administration to be improper, and we reserve our rights in all respects as to any further
116 matters which may arise in connection with the finalizing of the accountings under the Bareboat Charter.

We submit herewith an accounting statement prepared in accordance with the foregoing, together with our invoice covering overpayments heretofore required in the amount of $705,426.32 and request that reimbursement in that amount be made.

Very truly yours,

NORTH ATLANTIC AND GULF STEAMSHIP COMPANY, INC.,

C. F. TEESE
General Auditor

fj
Enclosures
CC: Mr. J. G. Barkan
District Comptroller
Maritime Administration
45 Broadway
New York, New York

117 **Attachment to Affidavit**

Exhibit 6

January 31st, 1955

U. S. Department of Commerce
Maritime Administration
Washington 25, D. C.

Attention: Mr. Wesley C. Clark, Chief
Division of Credits and Collections

Gentlemen:

Subject: Your Ref. QM 147/L10-5-[illegible]453
Invoice 207-228-1 1/14/52 — $ 4,650.00
(Balance)
Invoice 506-242-12/17/54 — $125,778.84

We acknowledge receipt of your letter dated January 20th, 1955 requesting payment of the above invoices. We wish to discuss in this letter your invoice for $125,778.84 representing balance due of additional charter hire. Your invoice for $4,650.00 will be discussed in a separate letter.

As concerns your invoice for additional charter hire, we would like to point out that the Audit Report prepared by your District Office is subject to certain accepted adjustments which considerably lessen the amount of profit indicated in their report. These adjustments are to be made the subject of a Supplemental Accounting which will be submitted in the very near future. Any request for funds should recognize these conditions.

In any event, we can not recognize your invoice as a statement of amounts due. As we have pointed out in our previous correspondence addressed to your New York Office, and as you are no doubt aware, we have filed a Libel against the U. S. Attorney claiming refund of additional charter hire. Our libel is based on what we consider to be a proper interpretation of the terms of the Agreements involved.

118 We therefore suggest that any further action be withheld at this time as our Supplemental referred to above is prepared. We can only agree on what would be an amount of additional charter hire as calculated under

Maritime interpretation. However, no payment can be made without final disposition of the matter referred to above.

Very truly yours,

NORTH ATLANTIC AND GULF STEAMSHIP COMPANY, INC.,

C. F. TEESE
General Auditor

CFT:fj

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119 **Attachment to Affidavit**

Exhibit 6

U. S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
WASHINGTON 25, D. C.

Address Reply to
MARITIME ADMINISTRATION
and Refer to File No.

QM147/L10-5-2:453

Mar. 8, 1955

North Atlantic and
Gulf Steamship Company Incorporated
120 Wall Street
New York 5, N. Y.

Gentlemen:

Subject: Invoice 207-228- 1/14/52.. $ 4,650.00 (Balance)
Invoice 506-242-12/17/54.. 125,778.84

Reference is made to our letter of February 9 and your reply of February 24, 1955, relative to the payment of the subject invoices for additional Charter Hire due in accordance with the provisions of Clause 13, Part II of the Charter Contracts.

In your letter of February 24 you state as follows:

"We agree that the provisions regarding the preliminary payments of Charter Hire are quite clear, however, we feel that this question involves payment of additional Charter Hire as determined on the basis of final audit. The amount of additional Charter Hire indicated on your invoice

is the amount shown on the audit report prepared by your local district auditor, however, if you will review your files you will find that this audit report was accepted only on the basis that it was to be amended by supplemental accountings."

Once again we would like to call your attention to the last part of Clause 13 of the Agreements which states as follows:

"* * * that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which time such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required."

Under the terms of the Agreemnets quoted in part, above, your company is indebted to the United States for additional Charter Hire at this time.

In reference to the last paragraph of your letter calling our attention to the fact that your Company has a suit pending against the United States Government; we fail to see how this pending suit has any bearing whatsoever on the payment of the subject invoices, for amounts due this Administration pursuant to the provision of the Charter Agreements, and binding upon your company to pay.

Accordingly, it is requested that you remit the amounts presently established as being due the United States for additional Charter Hire and promptly take the necessary action to finally resolve with our District Comptroller the questions relating to the accountings previously approved by him. Your rights to recover any amounts which may be determined by such subsequent action to have been overpaid, are reserved to you in the Charter Agreement.

Very truly yours,

WESLEY C. CLARK
Wesley C. Clark
Chief, Division of Credits
and Collections

121 IN UNITED STATES DISTRICT COURT

BLIDBERG ROTHCHILD CO., INC. v. UNITED STATES OF AMERICA.

IN ADMIRALTY 188-69.

Memorandum Opinion Sustaining Exception, Dismissing Libel and Denying Motion for Leave to Amend—November 5, 1956

Libelant here seeks to recover from respondent alleged overpayments made pursuant to its charter of certain Government-owned vessels. Libelant further seeks leave to amend its libel in order to allege, in fuller detail, the transactions giving rise to the alleged causes of action.

Respondent excepts to the libel as time-barred under Suits in Admiralty Act, 46 U. S. C. A. section 741, *et seq.*, and opposes the proposed amended libel on the theory that, as amended, the libel still fails to state a cause of action accruing within the required two-year limit prior to the date of filing of the libel.

Respondent's exception is sustained; libel is dismissed. Libelant's application for leave to amend is denied.

The points now at issue before the Court have been too well-settled by recent authoritative decisions as to require consideration *de novo*. *Sword Line* v. *United States*, 228 F. 2d 344 (C. A. 2 1955), aff'd on petition for rehearing 230 F. 2d 75 (1956), aff'd 351 U. S. 976 (1956), cert. having been granted only on the question of admiralty jurisdiction; *American-Eastern Corp.* v. *United States*, 133 F. Supp. 11 (S. D. N. Y. 1955); aff'd 231 F. 2d 664 (C. A. 2 1956), cert. denied 351 U. S. 983 (1956); *A. H. Bull Steamship Co.* v. *United States*, 141 F. Supp. 58 (S. D. N. Y. 1956). The Court has read the briefs in the three cited cases and is satisfied that the questions of law presented herein were adequately argued before and decided by the courts in such cases.

Settle order on notice.

/s/ WILLIAM B. HERLANDS,
United States District Judge.

122 IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Ad. 188-69.

BLIDBERG ROTHCHILD CO., INC., Libelant,

against

UNITED STATES OF AMERICA, *Respondent.*

Order Sustaining Exception, Dismissing Libel and Denying Motion for Leave to Amend—November 15, 1956

The respondent having excepted to the libel herein and said exception having duly come on for hearing before this Court on August 14, 1956 and the libelant having thereafter moved this Court for leave to file an amended libel, and due deliberation having been had by the Court and the Court's memorandum dated November 5, 1956 having been filed on said date, it is

On motion of Paul W. Williams, United States Attorney, proctor for the respondent herein

ORDERED that the respondent's exception to the libel herein be and the same hereby is sustained and the libel be and it hereby is dismissed for lack of jurisdiction of this Court by reason of Title 46 U. S. C. 745; and it is

FURTHER ORDERED that libelant's motion for leave to file an amended libel herein be and the same hereby is denied.

Dated: New York, N. Y., November 15, 1956.

WILLIAM B. HERLANDS,
United States District Judge

123 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 126, 135, 214-225—October Term, 1956.

Argued January 15, 1957

Docket Nos. 24190, 24200, 24291-2, 24283-9, 24400-2

No. 24190

AMERICAN-FOREIGN STEAMSHIP CORPORATION,
Libelant-Appellant,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee.*

No. 24200

STOCKARD STEAMSHIP CORPORATION, *Libelant-Appellant,*

v.

UNITED STATES OF AMERICA, *Respondent-Appellee.*

No. 24291

A. H. BULL STEAMSHIP CO., BULL INSULAR LINE, INC., BALTIMORE INSULAR LINE, INC., *Libelants-Appellants,*

v.

UNITED STATES OF AMERICA, *Respondent-Appellee.*

124 No. 24292

NEW YORK AND CUBA MAIL STEAMSHIP COMPANY,
Libelant-Appellant,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee.*

No. 24283

DICHMANN, WRIGHT & PUGH, INC., *Libelant-Appellant,*

v.

UNITED STATES OF AMERICA, *Respondent-Appellee.*

No. 24284

POLARUS STEAMSHIP CO., INC., *Libelant-Appellant*,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee*.

No. 24285

A. L. BURBANK & COMPANY, LTD., *Libelant-Appellant*,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee*.

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125 No. 24286

T. J. STEVENSON & CO., INC., *Libelant-Appellant*,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee*.

Nos. 24287 and 24289

NORTH ATLANTIC AND GULF STEAMSHIP CO.,
Libelant-Appellant,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee*.

No. 24288

LUCKENBACH STEAMSHIP COMPANY, INC.,
Libelant-Appellant,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee*.

No. 24400

BLIDBERG ROTHCHILD CO., INC., *Libelant-Appellant*,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee*.

126 Nos. 24401 and 24402

FALL RIVER NAVIGATION CO., *Libelant-Appellant*,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee*.

Before:

MEDINA and HINCKS, *Circuit Judges*, and
LEIBELL, *District Judge*.

Consolidated appeals from orders of the United States District Court for the Southern District of New York, Palmieri and Herlands, *JJ.*, finally dismissing for lack of jurisdiction libels to recover allegedly illegal overcharges made by the Maritime Commission on its charter dealings with the libelants. Affirmed as to all appeals except the Dichmann, Wright & Pugh, Inc. appeal, which is dismissed.

J. FRANKLIN FORT, KOMINERS & FORT, Washington, D. C. (John Cunningham, Israel Convisser and Edwin K. Reid, of counsel), *for all libelants-appellants except American-Foreign Steamship Corp.*

Of Counsel:

Burlingham, Hupper & Kennedy, New York, N. Y., for North Atlantic & Gulf Steamship Co. and Luckenbach Steamship Co.

Cravath, Swaine & Moore, New York, N. Y., for New York and Cuba Mail Steamship Company.

127 Hill, Betts & Nash, New York, N. Y., for Dichmann, Wright & Pugh, Inc.

Kirlin, Campbell & Keating, New York, N. Y., for A. H. Bull Steamship Co., etc.

Lester Levin, New York, N. Y., for Polarus Steamship Co., Inc., A. L. Burbank & Co., Ltd., and T. J. Stevenson & Co., Inc.

Zock, Petrie, Sheneman & Reid, New York, N. Y., for Stockard Steamship Corp., Blidberg Rothchild Co., Inc., and Fall River Navigation Company (Roberts & McInnis, Washington, D. C., Francis J. O'Brien, Charles

B. McInnis, and Roger H. Muzzall, of counsel, in Fall River Navigation Company).

ARTHUR M. BECKER, FOLEY, JAMES & CONRAN, New York, N. Y. (Becker & Maguire, Washington, D. C., of counsel), *for libelant-appellant American-Foreign Steamship Corporation.*

BENJAMIN H. BERMAN, Attorney in Charge, New York Office, Admiralty & Shipping Section, Department of Justice (George Cochran Doub, Asst. Attorney General, Paul W. Williams, United States Attorney, S. D. N. Y., Leavenworth Colby, Chief, Admiralty & Shipping Section, Department of Justice, Washington, D. C., on the brief), *for United States of America.*

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128. **Opinion—September 25, 1957**

HINCKS, *Circuit Judge*:

Each of the libelants herein chartered ships from the Government pursuant to the Merchant Ship Sales Act, 50 U. S. C. A. App. §1735 *et seq.*, and agreed to various terms of a standard charter, which made the rental price depend in part on the amount of the profit realized by the charterer. The libelants claim that the Maritime Commission, contrary to provisions of the Act, exacted from them too great a percentage of the profits and these actions were brought under the Suits in Admiralty Act, 46 U. S. C. A. §741 *et seq.*, to recover the illegally collected amounts. The foregoing cause of action is asserted in each of the libels. In several of the cases some payments were made by the shippers after redelivery of the ships and within two years of the filing of the libel. And some of the libelants sought to obtain refund of certain alleged overcharges caused by the Commission's refusal to allow certain expense deductions and its refusal to permit cumulative accounting under certain circumstances.[1]

In each case, the Government moved to dismiss the libels because of lack of jurisdiction, on the ground that all of the

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[1] A few of the libels alleged disputes as to the valuation of specific items entering into the cost basis upon which the profits were calculated. These included differences concerning the amount of "capital necessarily employed," the "post redelivery overhead expenses," the "cost of repairing latent defects," "management fees" and "agency fees."

claims stated therein were barred by the two-year limitation of the Suits in Admiralty Act, 46 U. S. C. A. §745. As to this, the Government's position was that the causes of action accrued as of the time the libelants returned their ships to the Commission, and that this "redelivery" date in all cases was more than two years prior to the commencement of suit. We append to this opinion a chart showing the dates pleaded in the libels and, in some
129 cases, in the Government's exceptive allegations. Since the dates in the exceptive allegations were not challenged, we accept them as true.

Judge Palmieri, in an opinion reported at 141 F. Supp. 58, dismissed all the libels, except those of Blidberg Rothchild and Fall River Navigation Co., and denied leave to amend because, however pleaded, the actions were time-barred. Judge Herlands, in a memorandum opinion set out in the margin,[2] dismissed the Blidberg Rothchild and Fall River Navigation Co. libels for the same reason. The sole question presented on this appeal is whether it was

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2 "November 5, 1956

MEMORANDUM

"Libelant here seeks to recover from respondent alleged overpayments made pursuant to its charter of certain Government-owned vessels. Libelant further seeks leave to amend its libel in order to allege, in fuller detail, the transactions giving rise to the alleged causes of action.

"Respondent excepts to the libel as time-barred under Suits in Admiralty Act, 46 U. S. C. A. section 741, et seq., and opposes the proposed amended libel on the theory that, as amended, the libel still fails to state a cause of action accruing within the required two-year limit prior to the date of filing of the libel.

"Respondent's exception is sustained; libel dismissed. Libelant's application for leave to amend is denied.

"The points now at issue before the Court have been two well-settled by recent authoritative decisions as to require consideration de novo. *Sword Line* v. *United States*, 228 F. 2d 344 (C. A. 2 1955), aff'd on petition for rehearing 230 F. 2d 75 (1956), aff'd 351 U. S. 976 (1956), cert. having been granted only on the question of admiralty jurisdiction; *American Eastern Corp.* v. *United States*, 133 F. Supp. 11 (S. D. N. Y. 1955); aff'd 231 F. 2d 664 (C. A. 2 1956), cert. denied 351 U. S. 983 (1956); *A. H. Bull Steamship Co.* v. *United States*, 141 F. Supp. 58 (S. D. N. Y. 1956) The Court has read the briefs in the three cited cases and is satisfied that the questions of law presented herein were adequately argued before and decided by the courts in such cases.

"Settle order on notice.

WILLIAM B. HERLANDS
United States District Judge."

correct to dismiss the libels and deny amendment because jurisdiction was lacking.

130 Before dealing with this question, we note that we are without appellate jurisdiction over the Dichmann, Wright & Pugh appeal. Dichmann, in its reply brief, conceded that, since the second count of its libel was still pending in the District Court, its appeal from the dismissal of the first and third counts was interlocutory. It cited 28 U. S. C. A. §1292(3) as express statutory authority for us to entertain this appeal. But our authority to entertain interlocutory admiralty appeals is limited by the requirement of 28 U. S. C. A. §2107 that the appeal be filed within 15 days after entry of judgment. Here, the judgment appealed from was filed on May 22, 1956 and the appeal was not filed until August 10, 1956,—more than 15 days later. The appeal therefore is too late, and must be dismissed. *The Fanny D* (*Eggers* v. *Southern Steamship Co.*), 5 Cir., 112 F. 2d 347, cert. den. 311 U. S. 680; *Blaske* v. *Dick*, 7 Cir., 126 F. 2d 96, 98.

In the appeals which are properly before us, the following facts are pertinent to the issues raised. The Maritime Commission in 1946 was authorized by statute to charter vessels owned by the Government. The statute, 50 U. S. C. A. App. §1735 *et seq.*, provided for rental rates in §1738, which incorporated by reference §709(a) of the Merchant Marine Act, 46 U. S. C. A. §1199(a). This latter section provided that every charter executed by the Maritime Commission should contain provision that, whenever the charterer's adjusted profits exceed a certain amount, the charterer must pay as additional charter hire one-half of the profits in excess of a 10% return of employed capital. The Commission, claiming that §709(a) merely set a minimum additional charter hire, proceeded to charter its ships pursuant to charters which provided a sliding scale for the additional charter hire depending on the amount of profits per day in excess of the 10% return. The libelants, as charterers, agreed to progressive rates which allowed the Com-

131 mission to recapture 90% of the profits in excess of $300 per day, per vessel, above the 10% return, and made payments accordingly.

However, the libelants objected to the sliding scale rate as illegal before making payment thereunder and obtained

from the Maritime Commission the assurance that payments of charter hire were to be deemed preliminary and subject to adjustment until final audit. In recognition of this the Commission inserted Clause 13 in the charters.[3] In addition, the libelants claim that all parties to the charters operated under the assumption that, until final audit, charter hire payments were merely preliminary. To support this, they point to Commission regulations, 46 CFR §§299.31 (k) (1), 299.37-2 (a) (1), (2) and (b) (3), to instructions such as the one set out in the margin,[4] and to the
132 Commission's routine procedure, established pursuant to instructions from the General Accounting Office, of depositing the additional charter hire in an "unearned money" account rather than in the "miscellaneous receipts" account required by statute, 50 U. S. C. A. App. §1745(d).

The libelants argue that the cause of action for return of charter hire illegally exacted accrued as of the date of final audit, or—at the earliest—when the last payment or credit entry in their account with the Commission was

[3] "Clause 13. Additional Charter Hire. * * *

* * * * *

"The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (Warshipdemiscout) charter (prior to the times of payment for above or in such Warshipdemiscout charters) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required."

[4] "Where a voucher check is tendered by the Charterer, it is requested that no reference be made thereon through restrictive legend or otherwise to the effect that it is a final settlement. The accompanying letter of transmittal should state that the remittance is on account of additional charter hire due the Maritime Administration and is subject to adjustment upon the completion of final accounting between the Charterer and the Maritime Administration and that neither the tender of such payment by the Charterer, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of either party under the terms of the agreements involved or otherwise." (May 14, 1951 letter from Maritime.)

made. In all cases this would avoid the time bar. The Government contends that the statute commenced running as of the date when each libelant redelivered the chartered vessels to the Commission. If this be so, these libels would be time-barred.

We agree with the judges below that the basic issues in this appeal were decided adversely to the appellants in our decision in *Sword Line* v. *United States*, 2 Cir., 228 F. 2d 344, aff'd on petition for rehearing 230 F. 2d 75, aff'd as to jurisdiction 351 U. S. 976, and in *American Eastern Corp.* v. *United States*, 133 F. Supp. 11, aff'd 2 Cir., 231 F. 2d 664, cert. den. 351 U. S. 983.

The *Sword Line* case held that a cause of action, such as that presented in these appeals, accrues as of the redelivery date. See 228 F. 2d 344, 347; 230 F. 2d 75, 76. In so holding, the majority in that case carefully considered and explicitly rejected the argument that the effect of Charter Clause 13 was to delay the commencement of the running of the statute until final audit. This was also the holding in *American Eastern, supra*, 133 F. Supp. at page 15.

To avoid the impact of these decisions, the appellants have restated their theories but even as restated most of them were presented and rejected in *Sword Line* and *American Eastern*. The "mutual account" or "open account" theory as advanced by Judge L. Hand was rejected by his colleagues in the *Sword Line*, 228 F. 2d at 347, and by the court in *American Eastern*, 133 F. Supp. at page 15. Nor were the preliminary charter hire payments a "trust fund" because they were kept in a special account. This argument was forcefully brought to the court's attention in the *American Eastern* appeal by a letter from appellants' counsel which thoroughly discussed the point and cited the court to *Rosenman* v. *United States*, 323 U. S. 658. In its petition for rehearing in *Sword Line*, the appellant made essentially the same argument but in somewhat more general terms.

There remains the contention, forcefully urged by those appellants to whom it is available, that, even if suits for refund of payments made prior to redelivery of the ships are time-barred, the court had jurisdiction over those libels which demanded refund of post-redelivery payments to the Commission which were made within two years of

the filing of the libel. (For libels so situated, see the Appendix hereto.) The Government replies that the libelants cannot now demand refund since such payments were voluntary, citing *Railroad Co.* v. *Commissioners*, 98 U. S. 541, and *Cunard S.S. Co.* v. *Elting*, 2 Cir., 97 F. 2d 373, and that, in any event, since the libelants accepted the ships on the Commission's terms, they are now estopped from disputing them, citing *Commissioner of Internal Rev.* v. *National Lead Co.*, 2 Cir., 230 F. 2d 161, aff'd on other grounds 352 U. S. 313.

This point was unmistakably presented and was disposed of without discussion by another panel of this court in *Sword Line* in an opinion which did not explain why the court lacked jurisdiction of the claim for recovery of the post-redelivery payments. However, the rationale of the opinion in that case which was equally applicable to
134 payments made before and after redelivery, and the rationale of *American Eastern*, required the orders of dismissal now before us on review. Indeed, in its briefs and its petition for rehearing in *Sword Line*, the libelant pointed out that after redelivery and within two years prior to the libel it had paid to the Commission $660,000, which it contended was additional charter hire. Yet the court held that there was no jurisdiction to entertain the claim.

Apparently the only point now pressed which was not determined in *Sword Line* or *American Eastern* was raised in the Blidberg libel. This concerned a claim for expenses incurred in repairing latent defects which existed when the ships were received by Blidberg. But this claim was obviously in existence, at the very latest, when the ships were redelivered. Since the libels were not filed within two years of the redelivery these claims are barred. 46 U. S. C. A. §745.

If the subject-matter of these appeals were *res nova*, we are by no means sure that our dispositions would coincide with those made by the majority opinion in *Sword Line* and by *American Eastern*. However, we will not overrule these recent decisions of other panels of the court. On the authority of *Sword Line* and *American Eastern* we hold that these libels also were barred.

Accordingly, the decrees appealed from are affirmed except the Dichmann, Wright & Pugh, Inc. appeal which is dismissed.

Docket No.	Name of Libelant	Libel Filed	Charter Contracts Signed	Last Ship Redelivered	Last Final Audit	Date of Last Payment to Maritime	Date of Last Item in Account
24190	American-Foreign S.S. Corp.	11/24/54	6/ 6/46 9/ 2/46	12/28/49	10/11/54*	9/21/53	9/21/53
24200	Stockard S.S. Corp.	10/ 5/54	9/ 2/46 8/21/50 1/ 5/51	2/11/52*	5/20/55 (supplement)	6/23/53	12/21/53
24283	**Dichmann, Wright & Pugh, Inc.	5/13/54	9/ 2/46 10/ 5/46	12/10/49*	12/12/52	2/26/53	11/20/53
24284	Polarus S.S. Co., Inc.	11/10/54	10/18/46	12/ 7/49*	11/13/52	4/ 6/53***	7/29/54
24285	A. L. Burbank & Co., Ltd.	5/27/54	9/26/46 9/ 3/46	4/17/48*	11/ 9/54	3/16/53	4/25/55
24286	T. J. Stevenson & Co., Inc.	3/16/55	11/18/46	12/ 2/49*	9/ 1/53	11/27/53	6/10/54
24287	North Atl. & Gulf S.S. Co.	12/16/54	10/31/46	6/10/48*	None yet 12/22/53	5/18/53 No payments	5/17/54 12/14/53
24288	Luckenbach S.S. Co., Inc.	12/20/55	7/12/46 9/24/46 1/ 5/51	4/23/51	No audit yet on 1951 contract 11/ 8/54	after 12/20/53 9/27/53	5/17/54
24289	North Atl. & Gulf S.S. Corp.	10/21/54	7/17/51 4/ 2/52	2/13/52*	No audit yet for 12/54 contracts		
24291	A. H. Bull S.S. Corp.	4/22/54	4/21/47 9/ 2/46 9/13/46	2/26/48*	5/12/52	8/18/53	9/29/53
24292	New York & Cuba Mail S.S. Co.	1/27/55	11/12/46 11/25/46 10/26/50 11/28/50	5/28/52*	10/ 4/54	9/24/53	12/ 7/54
24400	Blidberg Rothchild Co., Inc.	4/13/56	6/25/46 9/ 4/46	11/28/49	4/16/54	8/19/55***	11/ 7/56
24401	Fall River Navigation Co.	2/14/56	6/ 1/46 9/ 2/46	10/28/49	3/10/54	No payments after 2/14/54	6/ 9/52
24402	Fall River Navigation Co.	2/14/56	6/ 1/46 9/ 2/46	10/28/49	3/10/54	No payments after 2/14/54	3/10/54

* Information obtained from exceptive allegations.

** This covers only first cause of action.

*** Setoff; not actual payment.

136 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN-FOREIGN STEAMSHIP CORPORATION,
Libelant-Appellant,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee.*

(and 13 companion cases)

Docket Nos. 24190, 24200, 24291-2, 24283-9, 24400-2

Order on Petitions for Rehearing Before the Court En Banc—December 19, 1957

The division of the court which heard and decided these appeals having referred the pending petitions for rehearing to the whole court and the court having voted to grant the petitions for *en banc* procedure,

It is ordered that the rehearing be limited to the jurisdictional question involved and that the submission of that issue be made on written briefs which may in so far as each party desires incorporate by reference its briefs heretofore filed.

It is further ordered that within twenty days the parties file written briefs each containing its statements of position and supporting argument as to the following questions:

For determination of jurisdiction as affected by the statute of limitations did the statute begin to run

(1) on the date of redelivery?

(2) on the dates of the payments recovery of which is sought?

137 (3) on the date of the final audit provided for in Clause 13?

(4) on some variation from the above dates or some other beginning point?

Within ten days after the time above limited for the filing of briefs any party may file a reply brief.

/s/ HAROLD R. MEDINA
C. J.

New York, N.Y.,
December 19, 1957.

138 (File endorsement omitted)

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139 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 126, 135, 214-225—October Term, 1956.

(Argued January 15, 1957
Original opinion filed September 25, 1957.)

Docket Nos. 24190, 24200, 24291-2, 24283-9, 24400-2

No. 24190

AMERICAN-FOREIGN STEAMSHIP CORPORATION,
Libelant-Appellant,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee.*

No. 24200

STOCKARD STEAMSHIP CORPORATION, *Libelant-Appellant,*

v.

UNITED STATES OF AMERICA, *Respondent-Appellee.*

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140 No. 24291

A. H. BULL STEAMSHIP CO., BULL-INSULAR LINE, INC.,
BALTIMORE INSULAR LINE, INC., *Libelants-Appellants,*

v.

UNITED STATES OF AMERICA, *Respondent-Appellee.*

No. 24292

NEW YORK AND CUBA MAIL STEAMSHIP COMPANY,
Libelant-Appellant,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee.*

No. 24283

DICHMANN, WRIGHT & PUGH, INC., *Libelant-Appellant*,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee*.

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141 No. 24284

POLARUS STEAMSHIP CO., INC., *Libelant-Appellant*,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee*.

No. 24285

A. L. BURBANK & COMPANY, LTD., *Libelant-Appellant*,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee*.

No. 24286

T. J. STEVENSON & CO., INC., *Libelant-Appellant*,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee*.

Nos. 24287 and 24289

NORTH ATLANTIC AND GULF STEAMSHIP CO.,
Libelant-Appellant,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee*.

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142 No. 24288

LUCKENBACH STEAMSHIP COMPANY, INC.,
Libelant-Appellant,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee*.

No. 24400

BLIDBERG ROTHCHILD CO., INC., *Libelant-Appellant*,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee*.

Nos. 24401 and 24402

FALL RIVER NAVIGATION CO., *Libelant-Appellant*,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee*.

Before:

CLARK, *Chief Judge*, MEDINA, HINCKS, WATERMAN and MOORE, *Circuit Judges*.

Consolidated appeals from orders of the United States District Court for the Southern District of New York,
143 Palmieri and Herlands, *JJ.*, finally dismissing for lack of jurisdiction libels to recover funds allegedly illegally retained by the Maritime Commission in its charter dealings with the libelants. Reversed as to all appeals except the Dichmann, Wright & Pugh, Inc. appeal, which is dismissed, and the dismissal of the sixth cause of libel of Blidberg Rothchild Co., Inc., which is affirmed.

J. FRANKLIN FORT, KOMINERS & FORT, Washington, D. C. (John Cunningham, Israel Convisser and Edwin K. Reid, of counsel), *for all libelants-appellants except American-Foreign Steamship Corp.*

Of Counsel:

Burlingham, Hupper & Kennedy, New York, N. Y., *for North Atlantic & Gulf Steamship Co. and Luckenbach Steamship Co.*

Cravath, Swaine & Moore, New York, N. Y., *for New York and Cuba Mail Steamship Company.*

Hill, Betts & Nash, New York, N. Y., *for Dichmann, Wright & Pugh, Inc.*

Kirlin, Campbell & Keating, New York, N. Y., *for A. H. Bull Steamship Co., etc.*

Lester Levin, New York, N. Y., *for Polarus Steamship Co., Inc., A. L. Burbank & Co., Ltd., and T. J. Stevenson & Co., Inc.*

Zock, Petrie, Sheneman & Reid, New York, N. Y., *for Stockard Steamship Corp., Blidberg Rothchild Co., Inc., and Fall River Navigation Company* (Roberts &
144 McInnis, Washington, D. C., Francis J. O'Brien, Charles B. McInnis, and Roger H. Muzzall, of counsel, in Fall River Navigation Company).

Arthur M. Becker, Foley, James & Conran, New York, N. Y. (Becker & Maguire and Gerald B. Greenwald, Washington, D. C., of counsel), *for libelant-appellant American-Foreign Steamship Corporation.*

Benjamin H. Berman, Attorney in Charge, New York Office, Admiralty & Shipping Section, Department of Justice (George Cochran Doub, Asst. Attorney General, Paul W. Williams, United States Attorney, S. D. N. Y., Leavenworth Colby, Chief, Admiralty & Shipping Section, Department of Justice, Washington, D. C., and William E. Gwatkin, III, Atty. Admiralty & Shipping Section, Department of Justice, on the briefs), *for United States of America.*

Opinion on Rehearing before the Court, En Banc—July 28, 1958

Hincks, *Circuit Judge*:

Pursuant to libelants' petitions after the filing of our first opinion in this case, this court on December 19, 1957 granted rehearing *en banc** which was limited to the question of determining the proper commencement date of the two-year statute of limitations of the Suits in Admiralty Act, 46 U. S. C. A. §745. Our earlier (unreported) opinion is hereby withdrawn.

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* Judge Lumbard has not participated in this appeal.

Each of the libelants herein chartered ships from the Government pursuant to the Merchant Ship Sales
145 Act, 50 U. S. C. A. App. §1735 *et seq.*, and agreed to various terms of a standard charter, which made the rental price depend in part on the amount of the profit realized by the charterer. The libelants claim that the Maritime Commission, contrary to provisions of the Act, insisted on including in the standard charter provisions calling for excessive additional charter hire and these actions were brought under the Suits in Admiralty Act, 46 U. S. C. A. §741 *et seq.*, to recover such excess.

In each case, the Government moved to dismiss the libels because of lack of jurisdiction, on the ground that all of the claims stated therein were barred by the two-year limitation of the Suits in Admiralty Act, 46 U. S. C. A. §745. As to this, the Government's position was that the causes of action accrued as of the time the libelants returned their ships to the Commission, and that this "redelivery" date in all cases was more than two years prior to the commencement of suit.

Judge Palmieri, in an opinion reported at 141 F. Supp. 58, dismissed all the libels, except those of Blidberg Rothchild and Fall River Navigation Co., and denied leave to amend because, however pleaded, the actions were time-barred.* Judge Herlands, in an unreported memorandum opinion, dismissed the Blidberg Rothchild and Fall River Navigation Co. libels for the same reason. The sole question presented on this appeal is whether it was correct to dismiss the libels and deny amendment because, for failure of timely institution of the actions, jurisdiction was lacking.

Before dealing with this question, we note that we are without appellate jurisdiction over the Dichmann, Wright & Pugh appeal. Dichmann, in its original reply brief, conceded that, since the second count of its libel was still
146 pending in the District Court, its appeal from the dismissal of the first and third counts was interlocutory. It cited 28 U. S. C. A. §1292(3) as express statutory authority for us to entertain this appeal. But our authority

* This action was required under the holdings of prior decisions of this court which will be discussed in this opinion.

to entertain interlocutory admiralty appeals is limited by the requirement of 28 U. S. C. A. §2107 that the appeal be filed within 15 days after entry of judgment. Here, the judgment appealed from was filed on May 22, 1956 and the appeal was not filed until August 10, 1956. The appeal therefore is too late, and must be dismissed. *The Fanny D* (*Eggers* v. *Southern Steamship Co.*), 5 Cir., 112 F. 2d 347, certiorari denied 311 U. S. 680; *Blaske* v. *Dick*, 7 Cir., 126 F. 2d 96, 98.

In the appeals which are properly before us, the following facts are pertinent to the issues raised. The Maritime Commission in 1946 was authorized by statute to charter vessels owned by the Government. The statute, 50 U. S. C. A. App. §1735 *et seq.*, provided for rental rates in §1738, which incorporated by reference §709(a) of the Merchant Marine Act, 46 U. S. C. A. §1199(a). This latter section provided that every charter executed by the Maritime Commission should contain provision that, whenever the charterer's adjusted profits exceed a certain amount, the charterer must pay as additional charter hire one-half of the profits in excess of a 10% return of employed capital. The Commission, claiming that §709(a) merely set a minimum additional charter hire, proceeded to charter its ships pursuant to charters, Clause 13* of which pro-
147 vided a sliding scale for the additional charter hire depending on the amount of profit per day in excess of the 10% return. Under these progressive rates the Commission was allowed to recapture as much as 90% of the profits in excess of $300 per day, per vessel, above the 10% return.

However, the libelants claim that before entering into such charters and before making payments thereunder they

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* "CLAUSE 13. *Additional Charter Hire.* If at the end of the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall exceed 10 per centum per annum of the Charterer's capital necessarily employed in the business of the Vessels (all as hereinafter defined), the Charterer shall pay over to the Owner at Washington, D. C., within 30 days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to the percentages of such cumulative net voyage profit in excess of 10 per centum per annum on such capital computed in accordance

objected to the sliding scale rates as contrary to §709(a) and hence illegal; that by reason of their objections the Maritime Commission assured them that payments of additional charter hire would be deemed preliminary and subject to adjustment until final audit; and that, as a result of this understanding the final paragraph of Clause 13 was inserted in the charters. In addition, the libelants claim that all parties to the charters operated under the assumption that, until final audit, charter hire payments were merely preliminary. In support of this position, they point to Commission regulations, 46 CFR §§299.31 (k) (1), 299.37-2 (a) (1), (2) and (b) (3), to instructions such as the one set out in the margin,* and

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with the following table (but such cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period):

"Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of $100 per day—50%.

"Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $100 per day but not in excess of $300 per day—75% on such excess over $100 per day.

"Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $300 per day—90% on such excess over $300 per day.

"The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 303 (Warshipdemise-out) charter (prior to the times of payment provided for above or if such Warshipdemiscout charters) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required."

*"'Where a voucher check is tendered by the Charterer, it is requested that no reference be made thereon through restrictive legend or otherwise to the effect that it is a final settlement. The accompanying letter of transmittal should state that the remittance is on account of additional charter hire due the Maritime Administration and is subject to adjustment upon the completion of final accounting between the Charterer and the Maritime Administration and that neither the tender of such payment by the Charterer, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of either party under the terms of the agreements involved or otherwise.'" (May 14, 1951 letter from Maritime.)

to the Commission's routine procedure, established pursuant to instructions from the General Accounting Office, of depositing the additional charter hire in an "unearned money" account rather than in the "miscellaneous receipts" account required by statute, 50 U. S. C. A. App. §1745(d).

The Government now contends that Clause 13 of the charter is irrelevant to the limitations question and that the statute, of necessity, began to run on the date of payment with the result that all of the libels herein involving payments made before the date of redelivery are time-barred. The Government also argues that jurisdiction is lacking over libels for recovery of payments made after redelivery even if made within two years of suit because such payments as a matter of law were "voluntary" within the meaning of *Railroad Co.* v. *Commissioners*, 98 U. S. 541; *Cunard S.S. Co.* v. *Elting*, 2 Cir., 97 F. 2d 373. Since these contentions have been raised by exceptive allegations the Government, in reliance on comment in *The Ira M.*
149 *Hedges*, 218 U. S. 264, 270, is contending that the voluntary character of the payments, for which recovery is sought, deprives the court of jurisdiction.* The libelants, on the other hand, have placed their reliance on Clause 13, and maintain that under that clause no breach of contract could possibly have occurred until, after "final audit," the Government refused to refund moneys claimed to be due the libelants. In the alternative, the libelants urge recovery on a mutual accounts theory according to which the statute of limitations would begin to run from the date of the last payment or credit entry in the account.

The issues before us have been presented to this court twice before, although in not such comprehensive and forthright manner as in the present case. In *Sword Line* v. *United States*, 2 Cir., 228 F. 2d 344, and in the opinion therein on rehearing, 230 F. 2d 75, affirmed on other grounds 351 U. S. 976,** the limitations issue, which had not been raised in the district court, was presented on appeal for

* For purposes of this opinion it is not necessary to pass upon this contention. We observe, however, that carried to its logical conclusion the contention is that every issue going to the merits is jurisdictional.

** As to the timeliness of the libels, certiorari was denied.

the first time by the United States as appellee. This issue was one of three complex issues raised in the case. The court was in agreement in holding that the libelant's action had no merit because barred by a bankruptcy composition, but on the issue of limitations the majority, as pointed out on rehearing, held that the action accrued upon the date of the payment for which recovery was sought. 230 F. 2d at page 76. Judge Hand's mutual accounts approach was rejected. In *American-Eastern Corp.* v. *United States*, 133 F. Supp. 11, affirmed 2 Cir., 231 F. 2d 664, certiorari denied 351 U. S. 983, we relied upon the *Sword Line* ruling and affirmed the lower court without opinion.

150 The panel of this court which delivered the original opinion on these appeals—the opinion now withdrawn—felt unwilling to depart from the authority of those cases. But now that the court on rehearing has undertaken to proceed *en banc*, we feel under somewhat less constraint from our past decisions and consider anew, on the intrinsic merits, the issues now before us.

We have come to the conclusion that the rights of the parties to these charters, so far as additional charter hire is concerned, are governed by Clause 13. This is not the case, frequently occurring, in which money has been collected by the Government by virtue of a statutory direction. The statute involved in this case does not of itself authorize or require payments to the Government. Title 46 U. S. C. A. §1199(a) declares, "every charter made by the Commission • • • shall provide • • • " Therefore, unless the parties enter into a charter there can be no liability created under §1199(a). Accordingly, we must look to the charter and specifically to Clause 13 if we are to ascertain the rights and liabilities of the parties and evaluate the libelants' contentions that the Commission breached the charter and that the breach occurred not until it failed to return funds to the libelants after final audit and due demand.

When the libelants raised their contentions below, and in earlier cases, the Government's position was that Clause 13 was entirely irrelevant. Consequently, the Government never attacked the libelants' asserted interpretation of that clause: it filed no answers and its exceptive allegations raised no issues of fact. On this rehearing, however, for the first time the Government argues that even if Clause 13

is controlling on the limitations issue the libelants are misinterpreting the language of that clause: it now for the first time suggests that "each final audit" in Clause 13 means *each annual audit*. But this dispute as to inter-
151 pretation is plainly one that now appears to involve questions of fact on which extrinsic evidence is admissible. The parties never had occasion to present such evidence. And the particular problem of interpretation has never been passed upon by any judge in these cases or in any other that has been brought to our attention.

As to the interpretation of Clause 13 and its effect upon claims for the recovery of additional charter hire, we have been presented on appeal with many arguments based on facts alleged in briefs and affidavits, some but not all of which were part of the record below. But since the issue was not raised below, probably because the Government thought it irrelevant under the *Sword Line* decision, we think the cases should be remanded and the issue should be submitted to the trial judges for findings and determination after giving the Government opportunity to raise such issues of fact as may be desired. This is a case in which parol evidence is admissible on the disputed issue as to interpretation of the charters, Corbin on Contracts, Vol. 3, §579, and we think we should wait until the relevant record of fact below has been made and completed before we commit the court to any particular interpretation. Our preview, on this appeal, of the contentions of the parties as to Clause 13 leads us to suggest that issues framed thereby are peculiarly appropriate for determination on such evidence as the parties may offer rather than on affidavits. *Pacific-Atlantic Steamship Company* v. *United States*, D. Del. 1955, 127 F. Supp. 931. Of course the burden of proving jurisdiction remains throughout on the libelants. *Corporation of The Royal Exchange Assurance* v. *United States*, 2 Cir., 75 F. 2d 478. But we think the text of Clause 13 is an adequate, *prima facie*, showing of jurisdiction in the absence of pleading and proof by the Government that the libelants' interpretation of Clause 13 is incorrect.
152 The true intent of Clause 13 having been ascertained, it can then readily be determined whether these suits in so far as they seek recovery of additional charter hire have been brough within the two-year limita-

tion. And any suit thus found to have been timely brought should then, of course, be heard and decided on the merits.

Certain of the libels also include claims not directly based upon the asserted illegality of the progressive rate of additional charter hire under Clause 13. Thus, it is alleged that the Commission, for accounting purposes, improperly split the year 1947 into two segments which had the effect of unduly increasing the libelants' charter hire liability. The Commission's construction of the cumulative accounting provision is also asserted to have improperly increased the libelants' charter hire liability. One libelant asserts that the phrase "capital necessarily employed" as used in Clause 13 has been incorrectly determined with the result that its charter hire liability has been overstated. Another libelant asserts that the Commission improperly reduced its overhead expense, thereby increasing its charter hire liability, by offsetting certain management fees it had received and refusing inclusion of certain post redelivery overhead expenses in "the charterer's fair and reasonable overhead expenses applicable to operation of the vessels" as provided in the first paragraph of Clause 13. Two libelants contend that their charter hire liabilities were improperly increased by the refusal of the Commission to allow the inclusion of certain expenses for agency fees in the overhead expense figure envisioned by the extract from Clause 13 just above quoted. Every one of these claims relates solely to the proper computation of additional charter hire and has no independent basis. We hold that these claims should be dealt with in the same manner as the basic claim for recovery of excessive charter hire. For all were reserved by Clause 13 until "final audit" whatever that term shall be determined to mean.

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A different situation, however, prevails with regard to Blidberg's claim for refund of expenditures for latent defects existing at the time the vessels were delivered on charter as contained in its sixth cause of libel. Such a claim does not come within the express provision of Clause 13 which reserves disputes concerning "additional charter hire." The accrual of this claim, therefore, was not deferred until the final audit and consequently it is time-barred. *Isthmian Steamship Co.* v. *United States*, D. C.

S. D. N. Y., 146 F. Supp. 219. *Alcoa Steamship Co.* v. *United States*, D. C. S. D. N. Y., 94 F. Supp. 406. However, this item, though not directly recoverable, may indirectly affect the proper computation of Blidberg's additional charter hire. To the extent that this is so, it may be necessary to litigate this expense for its impact on a proper computation of Blidberg's additional charter hire even though direct recovery of the expense be time-barred.

To the extent that *Sword Line* and *American-Eastern* are inconsistent with rulings indicated above, they are overruled.

The appeal of Dichmann, Wright & Pugh, Inc. is dismissed. All other decrees appealed from are reversed and the suits are remanded for further proceedings in accordance with this opinion, except that the dismissal of Blidberg's sixth cause of libel is affirmed.

***Waterman, Circuit Judge (Dissenting)**

I concur with the majority that the purported appeal in No. 24283, *Dichmann, Wright & Pugh, Inc.* v. *United States*, should be dismissed for lack of appellate jurisdiction.

154 With respect to the issues relative to jurisdiction that the majority find to have been raised in the other thirteen cases and which in their judgment require remand to resolve, I concur in the dissenting opinion of Judge Clark. I would hold, with him, that the respective written instruments in each case, all of which contain the identical Clause 13, need no further judicial consideration below to make them properly interpretable, and that the interpretation placed upon these charter-parties in his dissent is a proper and justifiable one. I believe we should decide now, without more, whether these cases, case by case, are so time-barred as to deprive the courts of any jurisdiction over the respective alleged causes of action, and in the course of so doing I would follow our previous holdings in *Sword Line, Inc.* v. *United States*, 228 F. 2d 344 (2 Cir. 1955), *affirmed on rehearing*, 230 F. 2d 75 (2 Cir. 1956), *affirmed*, 351 U. S. 976 (1956), and in *American Eastern Corp.* v. *United States*, 231 F. 2d 664 (2 Cir. 1956), *cert. denied*,

351 U. S. 983 (1956). When the libels were dismissed below for lack of jurisdiction libelants moved to amend the dismissed libels in order to present additional grounds to justify the taking of jurisdiction. See *A. H. Bull S.S. Co. et al.* v. *United States*, 141 F. Supp. 58, 59-60. Not only were the libels severally dismissed below, but the motions to amend were severally denied; and appeals from the dismissals and the denials of the motions to amend were then taken. What is gained by not taking up these rulings now? Since it is my belief that the rulings below in these thirteen cases were in all respects proper, I would affirm the decisions of Judges Palmieri and Herlands below.

Clark, Chief Judge (Dissenting)

Despite many years on the bench I have still to find an acceptable formula for appellate disposition of a case
155 where the adjudication below gives concern, but falls short of clearly demonstrable error. Of this at least I do feel sure, that a court of review should not attempt to relieve itself of responsibility—get itself off the hook—by merely remanding, i.e., passing the buck back, to the trial court. It should remand only when it has a clear concept of what the trial judge can do to advance the case to final adjudication and precisely states that for his benefit and the benefit of the litigants thus subjected to tantalizing delay.

These basic requirements seem to me quite unfulfilled in the decision herewith. The mandate is merely for remand "for further proceedings in accordance with this opinion." The opinion proper has some further vague suggestions or directions for the "framing" of issues—apparently many of them—and for the taking of testimony—evidently extensive and unlimited—as to each. But the opinion itself demonstrates by the controlling force it gives to Clause 13 of the charters that there is really but a single issue, namely, the interpretation of a written instrument. And on this the record is already complete and the case ripe for final ruling. More precisely stated the issue is whether Clause 13 can be interpreted to control and set aside the normal rule—relied on in our earlier

rulings on the issue[1]—that on a quasi-contractual claim for refund of payments asserted to have been erroneously made the right of action accrues and the period of limitation begins to run from the time of the payments. Indeed, the whole tenor of the decision seems to be that, since limitation restrictions are harsh, we must search assiduously—and ask for trial court help thereto—for means to interpret a contract of seemingly different
156 purport to achieve that end. In taking this rather unusual course my brothers give short shrift to the views of many district judges and of two different panels of this court, whose adjudications the Supreme Court refused to disturb. I think the explanation proffered is inadequate for its task.

To understand what is happening we must consider the state of the existing record before remand. What we are dealing with is a "built-in" statute of limitation forming a very direct boundary to the grant of remedy against the sovereign. 46 U. S. C. §745. This is important in several ways. It shows the strong legislative policy against stale claims against the government. It clearly places the burden of proof upon the claimants to show that they properly come within an unrestricted class. And since it thus vitally delimits the court's jurisdiction, it makes appropriate and normal the usual processes for the testing of issues of federal jurisdiction, as actually had here, namely, motion and affidavit.[2] In short, it was incumbent upon the libelants to demonstrate by their affidavits that their libels were timely or, as applied to the issue here, that the negotiations for and background of the charters

[1] *Sword Line, Inc.* v. *United States*, 2 Cir., 228 F. 2d 344, affirmed on rehearing 230 F. 2d 75, affirmed 351 U. S. 976; *American Eastern Corp.* v. *United States*, D. C. S. D. N. Y., 133 F. Supp. 11, affirmed 2 Cir., 231 F. 2d 664, certiorari denied 351 U. S. 983.

[2] *Land* v. *Dollar*, 330 U. S. 731, 735; *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269, 278; *Central Mexico Light & Power Co.* v. *Munch*, 2 Cir., 116 F. 2d 85; *Williams* v. *Minnesota Min. & Mfg. Co.*, D. C. S. D. Cal., 14 F. R. D. 1; *Ramirez & Feraud Chili Co.* v. *Las Palmas Food Co.*, D. C. S. D. Cal., 146 F. Supp. 594, 597, affirmed *Las Palmas Food Co.* v. *Ramirez & Feraud Chili Co.*, 9 Cir., 245 F. 2d 874, certiorari denied 355 U. S. 927; and see full discussoin in 6 Moore's Federal Practice ¶ 56.03, pp. 2027, 2028 (2d Ed. 1953), also 5 *id.* ¶ 38.36, pp. 290-292 (2d Ed. 1951), 2 *id.* ¶ 12.09, pp. 2248-2250, 2256, ¶ 12.14 (2d Ed. 1948).

showed the correct interpreation of Clause 13 to be one for extending the time of suit. And this they attempted with at least a wealth of material, however pertinent it may be thought to be.

It is, indeed, a reflection upon able and shrewd counsel to believe that, faced with the legal requirement and
157 practical necessity of disclosure, they should have held back relevant and convincing material. One of the more confusing aspects of the decision is that it is not clear how far it is intended to repudiate the normal procedure for testing issues of federal jurisdiction as shown by the cases cited in my footnote 2 *supra*. In any event we cannot expect miracles of counsel; anything more they bring to a new trial will be only cumulative to what is already before us. Obviously were there oral evidence of direct statements of intent on the part of the negotiators now presently remembered (none has been suggested), such evidence could not be used to control or vary the written document. All the material useful for decision is actually at hand; I do not see why my brothers do not employ it for final adjudication that jurisdiction exists if such is the way they feel they must go. The obstacles will not be any the less after two or three more years of protracted litigation.

That this is their direction is, I think, to be fairly deduced from the opinion, even though the discussion therein is limited. Not only does it accept the text of Clause 13 as "an adequate, *prima facie*, showing of jurisdiction," but it takes the highly drastic and quite confusing course of overruling out of hand our two previous rulings to the contrary cited in my note 1 *supra*. What reason is there for overruling *Sword Line* and *American Eastern* if eventually they may be held correctly decided? Indeed, in the present state of division in the court, what reason or effect is there to this declaration in any event?[3]

Let us look more closely at this "prima facie" ruling. In interpreting the writing we must start with the congressional policy disfavoring stale claims. I see no reason here

[3] It is made by a minority only of the active judges, against the expressed view of other judges who may ultimately prevail. An overruling so deficiently based can only mislead the unwary.

for exceptional treatment. The contracts were made,
158 the services performed, and the payments made a decade or more ago. And what is more, the ships were actually returned to the government, thus entirely closing the transactions, almost a decade ago. It is especially strange, if these were live issues where the government was expected to make vast refunds, that some of the rental payments were actually made after the ships were returned.[4] One can understand belated payments by the charterers if they thought the hire was actually due, but hardly if they were preparing to claim that there had already been gross overpayment. If ever stale claims against the government are to be viewed with a jaundiced eye, these would seem to be the occasion.

Turning now to Clause 13 itself—quoted in full in the opinion—it should be noticed that it is not a provision for claim adjustment; nor does it in any way suggest that it was meant to deal with the processing of claims for refund. Clearly it is what is labeled as being, namely, a provision for "Additional Charter Hire." It follows naturally after Clause 12, covering "Basic Charter Hire," and in its main section provides a scale for such additional hire based on cumulative net voyage profits of the charter in any *calendar year*. The emphasis on yearly accountings is obvious. The particular provisions here in issue come at the end and deal with preliminary and final payments of such additional charter hire, based on the scale stated. So a method is provided whereby the government can ask and receive preliminary payments as the money is earned, and the "final audits" clearly refer to the yearly settlements thus made necessary. Quite simply they are necessary because the progressive rate of additional hire depends on the
amount of cumulative profits *for the year*. They just
159 do not fit the concept of an ultimate and probably long delayed settlement of all disputes which might conceivably arise under any of the manifold provisions of these extensive charters. Significantly a much later charter provision does look to such possibility, thereby affording

[4] Some of the payments were actually made within the two-year limitation; while these are not separately noted in the opinion, they seem barrd as voluntary payments.

a persuasive contrast. For Clause 28 deals with "Accounting, Report and Supervision" and requires the keeping of books, the filing of financial statements, and the like covering all transactions, while it also authorizes the auditing of all books and the maintenance of checks and controls of expenditures and revenues in connection with the operation of any of the chartered vessels.

In the final paragraph of Clause 13 the preliminary statements therein referred to are correlated with the final audit. This places a well-nigh insuperable obstacle in the way of the interpretation claimed by libelants. For the "adjustment" visualized is to be had "either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner"; the idea is carried further thus, "at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required." Each final audit therefore serves a function of settling the payments due on each calendar year's profits. Thus it fits properly with the rest of the clause. It cannot be made to mean some final settlement of all and sundry differences a decade or more hence when at length both parties are prepared to have a balance struck. Thus the government's brief is correct in saying: "Thus the charterers' right to file a claim for adjustment and refund of an overpayment of additional hire *and to bring immediate suit if refund was not made* is precisely the same at the time of a charterer's rendition of its preliminary accountings and at the time of the owner's final audit."

160 This natural construction is supported by various Maritime Administration regulations which (1) require the charterer at the end of each calendar month to pay 90 per cent of the additional charter hire then indicated to be due, 46 CFR 299.31(k)(1); (2) provide that such payments are preliminary and subject to adjustment upon completion of audit by the government covering the period involved (the calendar year), *id.*; (3) provide that tender of the monthly payments and their acceptance do not prejudice rights under the charter or otherwise, *id.*; (4) require remittance of monthly payments to be accompanied by a preliminary statement, 46 CFR 299.31(k)(2); (5)

provide that if this statement indicates that 90 per cent of the cumulative total for the expired portions of the period involved (calendar year) is less than the total of payments theretofore made for the period, the charterer may apply for a refund, 46 CFR 299.31(k)(5); and (6) require each charterer to submit a separate final accounting of additional charter hire for each annual or over-all accounting period [which under 46 CFR 299.37-1(h) and (i) is defined as a calendar year or a period less than a calendar year, 46 CFR 299.37-2(b)]. Hence, simply put, Clause 13, read with the regulations, provides that the charterers must make monthly payments on account of the additional charter hire which are preliminary because only upon the rendition of preliminary statements or upon final audit for the year will the parties know whether or not the amounts of the monthly payments were correct.

Neither in wording nor in practical operability, however, is the Clause appropriate for the adjustment of the type of "overpayment" here involved. For the charterers knew that as they read the law the sums here claimed were not correct even when remitted. So there is no suggestion anywhere in the contract that the earlier language in
161 Clause 13 bears on these "overpayments" in any way. Nor is there any suggestion in Clause 13 or in the regulations that the preliminary payments are tentative because the charterers believed the Clause to be illegal or that the parties agreed to put off a judicial determination of the legality of the rates. It is a strange contract which would preclude suit by the charterers to reform the contract or to recover the specific monthly "overpayments" if actually illegal. But, as the opinion herewith makes clear, libelants to succeed must rely on such an interpretation, viz., that the phrase "each final audit" can mean only some type of closing-out accounting which ultimately and finally terminates all relations between the charterers and the United States. I submit with all deference that the mere statement of the argument betrays its weakness; without fairly conclusive support somewhere for such a reading there is no "prima facie showing of jurisdiction." Surely the parties did not intend an agreement to require the deposits of huge sums of money for an indefinite time pending determination of the legality of the contract rates. For

quite clearly the period of limitation can start only when the parties agree and are content that they have eventually obtained an ultimate closing-out accounting. Ironically enough, since even late deposits are to be included, there is nothing to prevent the charterers from continuing to make the government a good and safe depositary, paying better than market rates of interest, for their excess funds. Hence for my part I cannot accept this as permissible interpretation against respondent's persuasive showing (wholly consistent with both the charters and the regulations) that "each final audit" means an audit of the charterers' *yearly* profits.

It is true that the libelants ably and ingeniously develop various arguments from the background material in an endeavor to combat this analysis. Doubtless they will
162 fashion others if allowed to prolong the proceedings.

But the very ingenuity exercised, viewed against the results achieved, suggests how pressing is their need for an argumentative support which they still find lacking. It hardly seems worth while now to discuss these arguments at length beyond a general suggestion of their weakness. They deal either with supposed inconsistencies with the government's present position, such as segregation of accounts or the like, or with claimed admissions by the Maritime officials. The principle against waiver of public rights by government officers would make these dubious in any event; but even more important is the fact that the inconsistencies or waivers are apparent only to those predisposed to see them. They obviously did not occur to the officials at the time. Unconscious waiver of public rights is not a legal principle to be pressed far.

The opinion states that the government for a considerable time concealed its present and ultimate contention. That charge, if important, does not seem to me to be sustained on the record. Appellants have vacillated in the theories they would rely upon, and seemingly have come to a choice of Clause 13 only recently. As the case developed there was not early occasion for the government to be more specific in its opposition (which has always been steady and continuous) than it has been. And its position has been reasonably well known, as was apparent in the earlier cases before us. So Judge Walsh, ably analyzing these points

in the trial court in the *American Eastern* case, D. C. S. D. N. Y., 133 F. Supp. 11, 16 (cited in note 1 *supra*), well concludes:

> "The labyrinthine aspect of the charter and regulations which libelant has seen fit to exaggerate are really only superficial. They are to be expected in any administrative attempt to deal with a complex subject
> 163 matter on a mass scale. Care must be taken not to permit their seeming complexity to confuse the elementary simplicity of the dealings between the parties."

In any event the point cannot be of controlling importance, since we have now come quite completely to the point where we enforce justice and the law, notwithstanding possible deficiencies in presentation by the lawyers.[5]

Consequently I must conclude that the procedure here does not require, but indeed makes anomalous, any further trial or delay in adjudication. The case is ripe for final settlement, which should now be had, of the jurisdiction issue. And any termination which does not follow the simple course stated in *Sword Line* and applied in *American Eastern* runs into serious difficulties, as resting upon a strained interpretation of a written instrument. Here some note should be taken of our procedure. These cases were originally argued on January 15, 1957. The process of decision, particularly the rehearing *in banc*, has delayed action now for a year and a half, and the end is of course not yet in sight. I fear nothing has been achieved by the delay but the accentuation of our differences, with no progress toward their adjustment. Had the case been terminated by February 1957 by decision of the original panel, with a concise statement of our disagreement—a matter of interest, which the public is entitled to know—but without attempting the supposed, though illusory,

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[5] See, e.g., *United States* v. *Bess*, 78 S. Ct. 1054; *Trop* v. *Dulles*, 356 U. S. 86, reversing 2 Cir., 239 F. 2d 527; *Vibra Brush Corp.* v. *Schaffer*, 2 Cir., May 13, 1958; *Columbia Research Corp.* v. *Schaffer*, 2 Cir., May 13, 1958; *Joint Council Dining Car Employees Local 370, Hotel and Restaurant Employees International Alliance* v. *Delaware, L. & W. R. Co.*, 2 Cir., 157 F. 2d 417, 420; *Massachusetts Bonding & Ins. Co.* v. *State of New York*, 2 Cir., July 11, 1958.

reconciliation of views to be obtained by a hearing *in banc*, every one, it seems, would have profited.

164 Hence I would affirm the decisions reached below by able district judges in accordance with views heretofore expressed by this court. I should add that of course I do not object to the dispositions made of certain libels not presenting the main issue. But as to this issue, since there would seem a distinct possibility of its going higher—in view of its great importance involving, *inter alia*, the premature and undefined overruling of previously settled precedents—I do feel an obligation to mention the further question here definitely presented as to the effect of a vote by a judge retired from regular active service under 28 U. S. C. § 371(b) upon an appeal which has been ordered heard *in banc*. The question arises because the governing statute 28 U. S. C. § 46(c) says: "A court in banc shall consist of all active circuit judges of the circuit"; and Judge Medina, whose vote is here decisive, took advantage of the retirement provisions of 28 U. S. C. § 371(b) on March 1 last. I do not like to raise the question (which obviously can be settled only by the Supreme Court or by corrective legislation) because I have been active in inducing retired colleagues to sit and because I regard their continued participation in cases committed to their consideration desirable and beneficial all around. And I think this conclusion also applies to retired District Judge Leibell, who sat on the original panel herein which voted for affirmance. But the matter has caused doubt and uncertainty in other cases we have had, and a definitive answer is urgently desirable.

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165 IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Present:

HON. CHARLES E. CLARK,
Chief Judge.
HON. HAROLD R. MEDINA,
HON. CARROLL C. HINCKS,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
Circuit Judges.

AMERICAN FOREIGN STEAMSHIP CORP.,
Libelant-Appellant,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee.*

Judgment—July 28, 1958

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that the opinion of this court, dated September 25, 1957, be and it hereby is withdrawn.

Further ordered that the judgment of this court, dated September 25, 1957, be and it hereby is vacated and that a judgment be entered on the opinion of this court rendered July 28, 1958.

A. DANIEL FUSARO
Clerk

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166 (File endorsement omitted)

167 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Submitted August 26, 1958
Docket Nos. 24190, 24200, 24291-2, 24283-9, 24400-2

AMERICAN-FOREIGN STEAMSHIP CORPORATION,
Libelant-Appellant,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee,*
And thirteen companion cases.

Before:

CLARK, *Chief Judge,*
MEDINA, HINCKS, WATERMAN and MOORE, *Circuit Judges.*

Petition of Appellee for Further Rehearing en Banc

GEORGE COCHRAN DOUB, Assistant Attorney General, Washington, D. C., Arthur H. Christy, United States Attorney, Southern District of New York, New York, N. Y., Leavenworth Colby, Chief, Admiralty & Shipping Section, Dept. of Justice, Washington, D. C., Benjamin H. Berman, Attorney in Charge, New York Office, Admiralty & Shipping Section, Department of Justice, and William E. Gwatkin, III, Atty., Admiralty & Shipping Section, Dept. of Justice, *for petitioner.*

168 **Opinion—March 26, 1959**

HINCKS, *Circuit Judge:*

The United States, as appellee, attacks the decision carried in our opinion of July 28, 1958, on the ground, *inter alia*, that Judge Medina, who concurred therein, by virtue of his retirement on March 1, 1958 was disqualified under 28 U. S. C. A. § 46(c) from participating. We disagree.

It was on December 19, 1957 that we granted rehearing of our earlier decision before the court *in banc*. The court *in banc* comprised Chief Judge Clark, Judges Medina, Hincks, Waterman and Moore, all then active circuit judges. Judge Lumbard declined to sit with the court on the ground that he was disqualified by reason of earlier contacts with the cases below when serving as United States Attorney. The court *in banc* when thus constituted conformed in all respects to 28 U. S. C. A. § 46(c) which provides: "A court in banc shall consist of all active judges of the circuit." Since Judge Medina was a member of the court *in banc* which was duly constituted to hear and determine the issues raised by the petition for rehearing, we think his subsequent retirement did not affect his competence to participate in the decision thereafter reached. Nothing in the Code requires that the court of appeals when once constituted according to law, whether *in banc* or by assignment as an authorized division, shall suspend its judicial task and reconstitute itself either to exclude an active member of the court thereafter retiring or to include an active member of the court thereafter appointed. As the Reviser's note indicates, § 46 was included in the Code of 1948 to preserve the interpretation established by *Textile Mills Securities Corporation* v. *Commissioner of Internal Revenue*, 314 U. S. 326, that notwithstanding the three-judge provision of § 212 of Title 28 U. S. C., 1940 Ed., a court of appeals might lawfully consist of a greater number of judges sitting *in banc*. Nothing in *Textile Mills* nor the Code provisions which preserve its interpretation suggests that re-
169 tirement under 28 U. S. C. A. § 371 operates to terminate the power of the retiring judge as a member of the court *in banc* to participate in the decision of a case formerly assigned to the court but as yet undecided. We have found no reported case which so holds. We think the case of *Commercial National Bank in Shreveport* v. *Connolly*, 5 Cir., 177 F. 2d 514, supports our conclusion that the competence of a judge who is once duly constituted a member of a court *in banc*, may survive his retirement. There Judge Sibley who as an active member of the Fifth Circuit Court of Appeals had participated in the decision of a case heard *in banc*, thereafter retired

(on October 1, 1949) and *subsequently* cast the decisive vote for an order (filed November 16, 1949) denying a petition for rehearing which had been made to the court *in banc*.

Moreover, § 43(b) of the Code of 1948 provides: "Each court of appeals shall consist of the circuit judges of the circuit in active service. The circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court." This provision is not stated to be exclusive of the "judges designated or assigned" to hear and determine a case as members of a court *in banc*. The provision is as applicable to such judges as it is to judges designated and assigned to the divisions of the court provided for in § 46(b) and to judges designated and assigned under §§ 294 and 296. The provision thus lends further support to our conclusion that Judge Medina, who under § 46(c) was designated and assigned as a member of the court *in banc* was competent even after his retirement to sit under §§ 43(b), 294(b) and 296.

The other claims of error raised in the petition we think unfounded. They involve matters already carefully considered by us. And the requested clarifications we think unnecessary and inappropriate. We have reversed and remanded for a determination of jurisdiction and,
170 if jurisdiction be sustained, of the merits. We have made it plain that these determinations should be made without constraint by *Sword Line* v. *United States*, 2 Cir., 228 F. 2d 344, and *American Eastern Corp.* v. *United States*, 2 Cir., 231 F. 2d 664, and of course in conformity with our opinion of July 28, 1958. The questions now put to us are questions for answer by the parties and the trial court.

Petition denied.

Separate Statement of Clark, Chief Judge, and Waterman, Circuit Judge

Judge Hincks' opinion herewith demonstrates both the difficulty and the impracticability of interpreting the governing statute, 28 U. S. C. § 46(c), otherwise than by giving the word "determined" its normal meaning of "decided," and the word "active" its natural force of "non-retired."

This view is underlined by the contrast drawn between judges "in active service" and "retired" judges, even though designated to sit, in the several statutes such as 28 U. S. C. §§ 294(b) and (d), 295, 296, and 371(b). It appears to be the general conclusion of other circuits. *In re Sawyer*, 9 Cir., 260 F. 2d 189, 203, n. 17, certiorari granted 358 U. S. 892; *G. H. Miller & Co.* v. *United States*, 7 Cir., 260 F. 2d 286, 305; *United States* v. *Gordon*, 7 Cir., 253 F. 2d 177, 185, 191, 194; see also *United States* v. *Sentinel Fire Ins. Co.*, 5 Cir., 178 F. 2d 217, 239, and *Commercial Nat. Bank in Shreveport* v. *Connolly*, 5 Cir., 177 F. 2d 514, interpreted in the light of Fifth Circuit Rule 29 stating the vote required for a rehearing. And it has been the uniform practice of our own elder colleagues. *Reardon* v. *California Tanker Co.*, 2 Cir., 260 F. 2d 369, 375, 376, certiorari denied *California Tanker Co.* v. *Reardon*, S. Ct., March 2, 1959; *United States* v. *Silverman*, 2 Cir., 248 F. 2d 671, 696, certiorari denied 355 U. S. 942; *Harmar* 171 *Drive-In Theatre* v. *Warner Bros. Pictures*, 2 Cir., 241 F. 2d 937, certiorari denied 355 U. S. 824. Moreover, it is necessary if the obviously indicated policy that the active circuit judges shall determine the major doctrinal trends of the future for their court is not be to flouted by the freezing in of a particular grouping of judges for months (as here) or even for years. And so notwithstanding some personal regret and even doubt as to the ultimate wisdom of the policy, it must be held that the decision of July 28, 1958, purporting to reverse the decrees below is ineffective and void for lack of a valid majority vote and those decrees under consideration here must stand affirmed by an equally divided court. *People* v. *Bork*, 96 N. Y. 188, 199; *Watson* v. *Payne*, 94 Vt. 299, 111 A. 462.

172 IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Present:

HON. CHARLES E. CLARK,
Chief Judge.
HON. HAROLD R. MEDINA,
HON. CARROLL C. HINCKS,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
Circuit Judges.

AMERICAN FOREIGN STEAMSHIP CORPORATION,
Libelant-Appellant,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee.*

Order Denying Government's Petition for Further Rehearing En Banc—March 26, 1959

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

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173 (File endorsement omitted)

174 SUPREME COURT OF THE UNITED STATES

No.

October Term, 1958

AMERICAN-FOREIGN STEAMSHIP CORPORATION, ET AL.,
Petitioners,

v.

THE UNITED STATES

Order Extending Time to File Petition for Writ of Certiorari—August 24, 1959

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

August 24, 1959.

JOHN M. HARLAN
Associate Justice of the Supreme Court of the United States.

Dated this 10th
day of June, 1959.

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176 SUPREME COURT OF THE UNITED STATES

No. 138

October Term, 1959

UNITED STATES OF AMERICA, *Petitioner,*

v.

AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.

Order Allowing Certiorari—October 19, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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